TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]180

HILTON JACKSON, RECEIVER OF THE FIRST CO-OPERATIVE BUILDING ASSOCIATION OF GEORGETOWN, D. C., PETITIONER,

vs.

JOHN LEWIS SMITH AND ETHEL L. WILSON.

[redacted]

(27,174)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 419.

E. HILTON JACKSON, RECEIVER OF THE FIRST CO-OPERATIVE BUILDING ASSOCIATION OF GEORGETOWN, D. C., PETITIONER,

vs.

JOHN LEWIS SMITH AND EDWIN L. WILSON.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 Court of Appeals of the District of Columbia.

No. 3194.

JOHN LEWIS SMITH et al., Appellants,

vs.

E. HILTON JACKSON, Receiver, &c.

Supreme Court of the District of Columbia.

In Equity, No. 27,845.

CORA BALL, ANNIE C. GUTHRIE, JAMES A. DAVIS and C. C. SAUNDERS, Complainants,

vs.

FIRST CO-OPERATIVE BUILDING ASSOCIATION OF GEORGETOWN, D. C., John Fleming, President; James H. Chamberlain, Vice President; J. Barton Miller, Secretary; S. Thomas Brown, George Freeman, W. A. Cunningham, H. P. Gilbert, Daniel Johnson, John Fleming, A. B. Jackson and F. A. Whelan, Directors; John Fleming, James H. Chamberlain, J. Barton Miller, S. Thomas Brown, George Freeman, W. A. Cunningham, H. P. Gilbert, Daniel Johnson, A. B. Jackson and F. A. Whelan, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

2 *Report of Receiver.*

Filed January 28, 1916.

In the Supreme Court of the District of Columbia Holding an Equity Court.

Equity No. 27,845.

CORA BALL et al., Complainants,

v.

FIRST CO-OPERATIVE BUILDING ASSOCIATION OF GEORGETOWN, D. C., et al., Defendants.

* * * * * * *

Your Receiver in this report, except in the most general way, has not dwelt upon the accounting features or attempted to state seriatim

or otherwise any shortage in the former Receiver's account for the duty of stating that account has been imposed upon Louis A. Dent, Esq., as Auditor and Special Master, respectively, by the orders of reference of this Court hereinbefore referred to. He takes this opportunity, however, of commenting upon one debit contained in the Special Master's report charged against the account of the former Receiver of $795.94. This debit is described at page 2 of Schedule "A" of the Special Master's report as "The Schwab sale and re-sale, not reported" and similarly described at page 3 of Schedule "B" of the same report. Schwab was a borrower listed in Exhibit "B" of the former Receiver's report of July 22, 1909. The Schwab property was Lot 7, Sq. 41, 24th Street, between H and I streets. From the evidence before the Special Master it appears that this property was, under the direction of the former Receiver, put up twice by Weschler, the Auctioneer, and on the second sale that it was knocked down to E. L. Wilson, Esq., at 6½ cents per square foot. Prior to this second sale, according to the testimony before the Special Master, it was agreed by and between William E. Ambrose, then Receiver, John Lewis Smith, his attorney of record in this cause, and E. L. Wilson that they would go into this sale jointly. E. L. Wilson took title to the property from Raphael A. Casilear, Surviving Trustee for said Association, by deed dated July 30, 1910, and recorded August 25, 1910, in Liber 3357, Folio 150, and then conveyed same by deed dated August 12, 1910, and recorded August 25, 1910, in Liber 3357, Folio 152, to H. A. Kite. There was outstanding at the time of the sale referred to a claim of Charles H. Wiltsie of $550, represented by tax deeds and sale certificates held by him. The $755.94 represents the net amount received by said Wilson, the $550 and other expenses stated by the Special Master being deducted from the gross. This net profit of $795.94 was divided in the proportion of one-third each among said Ambrose, Smith and Wilson.

3 That the arrangement referred to, resulting in the distribution stated of the profit made on account of said sale, was manifestly an improper one, and, to the extent of the profit realized, constituted an unlawful profit out of trust funds, and, therefore, properly chargeable against the account of said Ambrose by the Special Master, requires no demonstration.

* * * * * * *

Schedule "D."

* * * * * * *

(64) Schwab, Frederick S..... 2420-245

(Lot 7, Square 41.)

A Weschler sale, the proceeds from which not accounted for in said Schedule "A."

Property sold under said trust by Raphael A. Casilear, Surviving Trustee, to E. L. Wilson, by deed dated July 30, 1910, and recorded August 25, 1910, in Liber 3357, Folio 150. Said Wilson conveyed

to H. A. Kite by deed dated August 12 and recorded August 25, 1910, in Liber 3357, Folio 152. By deed recorded in Liber 3359, Folio 3, C. H. Wiltsie and Mary A. Wadhams conveyed to said Kite their interests acquired in certain tax deeds. For surcharge, See Special Master's Report.

* * * * * * *

Report of Receiver.

Filed December 1, 1916.

* * * * * * *

(5) Sale of Lot 7, Square 41, 24th Street, between H and I Streets, N. W., to Edwin L. Wilson.

The facts in regard to this sale were substantially set forth on pages 20 and 21 of the former report of your Receiver, filed herein on January 28, 1916. Being confirmed, by the advice of counsel, in the opinion expressed in said report as to the liability of Messrs. William E. Ambrose, John Lewis Smith and Edwin L. W-lson for the net proceeds of said sale, your Receiver has had various negotiations with Messrs. Smith and Wilson, personally and through counsel, looking to an amicable adjustment of this matter. These negotiations have finally taken shape in a proposal for arbitration set forth in a letter from Messrs. Smith and Wilson to your Receiver, dated November 22, 1916, hereto attached and made a part thereof. Your Receiver is entirely willing that the matter may be thus arbitrated and believes that such a disposition of it would be as speedy and satisfactory as any other. He recommends to the Court that said arbitration be authorized if the Court is of opinion that such *such* course may be lawfully taken, as to which he asks that the Court instruct him. If such arbitration is allowed your Receiver
4 and the representative of Messrs. Smith and Wilson will agree upon an arbitrator and submit his name to the Court when the order of reference is passed.

E. HILTON JACKSON,
Receiver.

W. W. MILLAN,
ROBERT H. TURNER,
Attorneys for Receiver.

* * * * * * *

WASHINGTON, D. C., November 22, 1916.

E. Hilton Jackson, Esq., Receiver. First Cooperative Bldg. Assn. of Georgetown, Washington, D. C.

DEAR SIR: We are writing you in reference to your claim, which has been the subject of previous correspondence and conferences, that we pay over to you as Receiver the net profits resulting from the re-sale of the Schwab property referred to at pages 21 and 22 of your report to the court filed on January 28, 1916.

As we have heretofore written and stated to you and your counsel we do not recognize any obligation on our part, legal, equitable or

moral, to pay to you the proceeds of the profits of the re-sale of this property, either in whole or in part, and will resist any effort made to recover from us the amount involved.

Recognizing that having made this demand upon us you must believe that there is some liability on our part and that it is your duty to press the claim, and at the same time entertaining no doubt of the correctness of our position, we nevertheless are willing to submit this matter for determination in the most expeditious manner possible.

We therefore suggest that the questions involved be submitted to arbitration before one or more arbitrators to be agreed on by both sides, our only requirement being that the arbitrator or arbitrators be fair-minded and disinterested men learned in the law.

If the matter be submitted to arbitration we agree to abide by the award and promptly perform any duty or obligation thereby imposed upon us, treating the award as a decree in equity; and we shall, of course, expect you to agree to be equally bound by such award.

If an agreement is reached to arbitrate these questions we will cooperate with you in agreeing upon the arbitrators and the details of the arbitration, and also cooperate with you in having the matter speedily heard and determined.

Yours very truly,

EDWIN L. WILSON.
JNO. LEWIS SMITH.

5 *Order.*

Filed December 8, 1916.

* * * * * * *

Upon consideration of the report of E. Hilton Jackson, Receiver herein, filed on the first day of December, A. D., 1916, it is this eighth day of December, A. D., 1916, adjudged, ordered and decreed:

* * * * * * *

Fifth, That this cause, in so far as it involves the differences between the Receiver and Messrs. John Lewis Smith and Edwin L. Wilson in the matter of the sale of Lot 7 in Square 41 of the City of Washington, District of Columbia, to Edwin L. Wilson, be, and it hereby is referred to Adolph A. Hoehling, Jr., Esquire as a Special Master, with instructions to hear and adjudicate the entire matter of said differences, both as to the facts and the law. The said Special Master shall consider the testimony relating to said matter, which has already been taken before Louis A. Dent, Esquire, former Auditor and Special Master, and his report thereon, as fully as if said testimony were newly adduced, and also any statement of facts which may be agreed upon and signed by the said Receiver and the said John Lewis Smith and Edwin L. Wilson; and the Receiver and the said John Lewis Smith and Edwin L. Wilson shall have the right to adduce, before the Special Master herein appointed, such legal and competent testimony as they may respectively desire to

adduce. The said Special Master herein appointed shall report to the Court his findings of fact and conclusions of law, together with such statement of account as he may find to be necessary and proper. With the reservation, however, of the right to a review by the Court of the said Special Master's report, both as to findings of fact and conclusions of law, for which purpose all parties shall have the right to file exceptions within the time prescribed by the rules of Court.

By the Court:

WENDELL P. STAFFORD,
Justice.

I consent on behalf of Messrs. Jno. Lewis Smith and Edwin L. Wilson.

J. S. EASBY-SMITH,
Their Attorney.

6 *Report of A. A. Hoehling, Jr., Special Master.*

Filed April 19, 1917.

* * * * * * *

By order of court passed herein, December 8, 1916, there were referred to the undersigned certain matters of difference between E. Hilton Jackson, Receiver, and John Lewis Smith and Edwin L. Wilson, in connection with the sale to said Edwin L. Wilson of Lot 7, in Square 41, City of Washington, District of Columbia; with instructions to hear and adjudicate the entire matter of said differences both as to the facts and the law, in accordance with the directions contained in said order.

In pursuance of said reference, hearings were had before the undersigned, on December 18, 1916, and January 16 and 18, 1917, at which were present the contending parties, in person or by counsel; testimony was adduced in support of the contentions of the several parties; and the matters in issue were argued, both orally and in typewritten briefs, and submitted, and the same duly considered; and, thereupon, the following report and adjudication is made and submitted, both on the facts and law:

The Facts.

There does not appear to be any very material disagreement as to the facts out of which this controversy arises. Briefly stated the facts are thus:

William E. Ambrose was appointed Receiver in the above equity cause, on or about July 11, 1908, and was such Receiver during all of the times embraced in this controversy. During said times, Mr. John Lewis Smith was one of the attorneys for said Receiver, although it does not appear that his duties as such attorney included anything in relation to sales of real estate made by trustees under deeds of trust securing advances or loans theretofore made by said Building Association. Furthermore, Mr. Smith expressly denies that he had any professional duty or connection with any of such

sales; including therein specifically the sale of the certain property embraced in this controversy, and hereinafter referred to.

The First Co-operative Building Association, at the time of the institution of the proceedings against it herein, was the holder or owner of divers debts due to it from borrowing stockholders, to whom it had theretofore made advances of money, the same being secured by deeds of trust upon real estate; and, upon the appointment of William E. Ambrose as Receiver, as above, said secured debts passed to him for appropriate collection and administration as assets of the Building Association; and, among others thereof, was an indebtedness of one Frederick S. Schwab, in the sum of $2,700, to secure the payment whereof to said Building Association, the said Schwab executed his certain deed of trust, dated August 10, 1909,
7 (recorded in Liber 2429, at folio 245, of the Land Records of the District of Columbia), conveying Lot No. 7, in Square No. 41, in the City of Washington, District of Columbia, to Jesse H. Wilson, (since deceased), and Raphael A. Casilear, as Trustees.

Thereafter, the property described was advertised by Raphael A. Casilear, as surviving trustee under the above deed of trust, and at the request of party secured, for sale at public auction, on Thursday, June 16, 1910.

On that occasion, Mr. Edwin L. Wilson bid upon the property; the property was knocked down to him upon his bid of $350, which was at the rate of about 4½¢ per square foot, but the property was later withdrawn by the trustee upon the ground that the amount of the bid was inadequate.

It seems that, immediately thereafter, the auctioneer, (Mr. Weschler), Mr. Ambrose, Mr. John Lewis Smith, and Mr. Edwin L. Wilson walked down the street together; that the auctioneer remarked that any property in the City of Washington that could be bought for ten cents a foot or under was cheap property; that Mr. Smith stated to Mr. Wilson that if he wanted to bid again, he would be willing to take an interest in the property if he, Mr. Wilson, should be the highest bidder; and Mr. Ambrose stated that he would go in too, in the event Wilson should become the purchaser at a second sale.

The agreement between the parties named, Ambrose, Smith, and Wilson, made in the informal way above referred to, and so far as it may be termed to have been an agreement, seems to have been thus: Wilson was to use his own judgment in bidding on the property at the second sale, both as to bidding at all and as to the amount of his bid; and if he should happen to become the purchaser thereof, the three persons named should be jointly liable for the purchase price and any expenses incident to the purchase of the property; and they should, also, be jointly interested in the property itself.

On the following day, Friday, June 17, 1910, the property was again advertised for sale at public auction; the same to be held on Tuesday, June 28, 1910.

Aside from the general and rather indefinite arrangement as to the possible purchase of the property by Wilson at a second sale, as the joint enterprise of the three persons named, nothing further

appears, so far as concerns any concerted plan of action, other than the fact that, at such second sale, Wilson in competition with one or more bidders, finally made a bid of $491, for the property, which was at the rate of 6 1/2¢ per square foot, and the property was knocked down to him at that figure. The testimony discloses that Mr. Wilson offered to give his check as a deposit on account of said sale, but, in view of his known responsibility, the same was not required of him.

It appears that Mr. Wilson made his bid for the property at this second sale in the exercise of his individual judgment, and without any previous conference with either Messrs. Ambrose or Smith; and that, in bidding, he had in mind what the auctioneer had theretofore stated about City property at ten cents a foot or under being cheap property. Mr. Wilson has testified that in making said bid of $491, it was his understanding that the three persons named would contribute equally to the purchase price.

It may be here remarked that, while Mr. Ambrose and Mr. Smith were both present at the second sale, there is no evidence that Mr. Smith participated therein in any way, either in the conduct of the sale, or in the acceptance of the bid of Mr. Wilson; nor is there any evidence that Mr. Ambrose gave any instruction or directions to the auctioneer or trustee in regard to the matter; the testimony of the auctioneer being to the effect that the ordinary course at such sales is for him to take the final instructions of the trustee, although, because of the lapse of time, he had no definite recollection as to the matter in this particular case as to conferring with either Ambrose, (settlor) or Casilear, (trustee.)

The following day, or possibly the day after, Mr. Smith communicated with one or more real estate men about the property; with the result that, under date, July 6, 1910, a deposit of $50, was made by Harry A. Kite with Allan E. Walker & Co., real estate agents, (the latter being clients of Mr. Smith,) for the purchase of said property for $1400., terms all cash; and that contract of purchase, thereupon, was approved and signed by Edwin L. Wilson, as purchaser of the property at the deed of trust sale, as above.

Later on, it developed that there were taxes in arrear upon said property; that it had been sold for taxes and deeded to one Charles H. Wiltsie; and that it would require some $550. (as per compromise thereof arranged with said Wiltsie), to clear the property, which amount was some $59. in excess of the entire amount of Wilson's bid for and purchase of the property, as above; and, accordingly, Wilson agreed to advance his bid to the extent of the additional amount needed to free the property of taxes, etc., in order that good title thereto might be conveyed to Kite, free and clear of taxes, tax liens, etc.

The net result of the matter was that Raphael A. Casilear, as surviving trustee, conveyed the above-described property to Edwin L. Wilson, by deed dated July 30, 1910, (and recorded August 25, 1910, in Liber 3357, at folio 150), upon the consideration therein stated of $489.75; and said Edwin L. Wilson, (his wife uniting therein), conveyed the same property to Harry A. Kite, (under the

contract of purchase thereof at $1,400., supra,) by deed dated August 12, 1910, (and recorded August 25, 1910, in Liber 3357, at folio 152.)

No money was actually paid, or required to be paid, by Wilson, the entire settlement of both of the above transactions having been accomplished through the re-sale made to Kite, and the payment by the latter of the agreed purchase price on re-sale of the property, as above.

The consideration paid, or agreed, to be paid, by Wilson, was absorbed entirely in cleaning up the back taxes on the property, tax deeds to Wiltsie, etc.; and thus the Building Association derived nothing therefrom on account of the indebtedness aforesaid secured by deed of trust upon said property. On the other hand,

9 Wilson, under his re-sale of the property to Kite, realized a net profit of $790.90; and that sum, thereupon, was equally divided by him among the three parties jointly interested in the enterprise, as above, each receiving one-third thereof, namely:

William E. Ambrose.....	$263.63
John Lew Smith.....	263.63
Edwin L. Wilson.....	263.63

By Report of Louis A. Dent, Special Master, filed in this cause, December 6, 1915, the entire amount of the above profit, plus $5., aggregating $795.90, was charged against William E. Ambrose Receiver, as one of the items making up the balance due by said Receiver upon the final statement and settlement of his accounts; this evidently upon the theory that the Receiver could not be allowed to make a profit in connection with any matters embraced within the receivership. That report was subsequently confirmed by the court. The surety on the Receiver's bond has made settlement to the full amount of its bond; but a large balance still remains chargeable against the Receiver on the general settlement of his accounts.

In the brief filed herein on behalf of Messrs. Smith and Wilson, attention is called to the fact that the present Receiver is now seeking a decree in this cause against said former Receiver, William E. Ambrose, for the full amount of the balance so found to be due upon the final settlement of his accounts, as above, including the item hereinabove mentioned; the same to operate as a judgment at law.

The Contentions of the Respective Parties.

It is to be noted that counsel for E. Hilton Jackson, Receiver herein, disclaims any actual fraud in respect of the transaction hereinabove referred to; but insists that, because of the fact that Ambrose was Receiver of the property and assets of the First Co-Operative Building Association, and that Smith was one of the attorneys for said Receiver, it was legally impossible for Wilson, even though an entire outsider, to have made any bargain or arrangement by which either or both of the above-named parties should be admitted by him to share in the property aforesaid, or in its proceeds, should he, Wilson, become the purchaser thereof at public sale; and that

the profits realized from a joint enterprise entered into and engaged in by parties thus situated are, in equity, impressed with a constructive trust in favor of the present Receiver of the Building Association.

On the other hand, counsel for Smith and Wilson insist that, insofar as Ambrose, as Receiver for the Building Association, may have been within the rule that absolutely prohibits and disqualifies him from receiving or making any profit out of the property or assets of the corporation then being administered by him, as such Receiver, that liability has been fixed and determined by decree in this cause, surcharging his accounts, on final settlement, with the entire amount of the profits realized on the re-sale of the property, as above, but that, as to Smith and Wilson, there was no such prohibition or disqualification; and that, therefore, under the facts of this case, there is no liability herein on the part of either Smith or Wilson.

Conclusions.

From the undisputed testimony in the case, it appears that, at the first attempted sale of the property at public auction, (and, at which time, the joint enterprise of which complaint is made herein had not been entered into), the highest bid received was that of Wilson, in the sum of $350., or at the rate of about 4½¢ per square foot.

At the next offer of the property for sale at public auction, and as the result of competitive bidding, the highest bid was $491., which was at the rate of 6½¢ per square foot; and, at that price, the property was sold to Wilson.

There is no evidence of any improper influence exerted by any one at this sale to prevent competition, or to close the competitive bidding, or to bring about the sale of the property to Wilson in preference to any one else, or at any particular price or figure.

On the contrary, it appears that the sale was fairly conducted; that there was competitive bidding; that Wilson acting upon his individual and independent judgment in bidding upon the property, and without previous conference or consultation with Ambrose, Smith, or any one else; and that the property was finally knocked down to him upon his bid of $491., (which was an advance of some 40% over his bid of $350, at the first attempted sale of the property at public auction, supra), as the highest bidder for the property.

Nothing has been adduced in the testimony indicating any active participation by Ambrose, as such Receiver aforesaid, at said second sale of the property, in any way affecting the fairness or integrity of said sale; save only the fact that his office as Receiver made it legally improper for him to acquire any interest in the property so sold; and the further fact suggested by counsel, that, as representative of the assets of the Building Association, he, in contemplation of law, controlled the final acceptance, or otherwise, of the highest bid made for the property at said second sale; and, therefore, ought not to have permitted the property to have been knocked down to Wilson at his bid of $491., even though that was the highest

bid obtainable and obtained. There is, however, no direct proof in the case that Ambrose actually participated with the selling trustee (Casilear), in knocking down the property to Wilson as the highest bidder therefor.

As a matter of fact, it does not appear that the price for which the property was knocked down to Wilson, at said second sale, was necessarily inadequate, in a legal sense; and this even though, at private re-sale, it brought a much higher figure and within a relatively short time thereafter.

11 The property was twice offered for sale at public auction, and the bid at the second sale was some 40% in advance over that offered at the first attempted sale.

True it is that, shortly thereafter, the property was re-sold privately at a large advance; but that fact alone is not necessarily determinative of the question of the adequacy, or otherwise, of the price obtained at the sale made at public auction.

One rather material circumstance in the case should not be overlooked, and that is, that the property sold was not the property of the Building Association—it was the property of Frederick S. Schwab, (or of his assigns, if he had disposed of it prior to the time of the foreclosure sale under deed of trust). Therefore, the only interest that the Building Association had in the property was a security or lien for the repayment of moneys theretofore advanced by it to Schwab.

Therefore, if there was any defect or infirmity in said second sale at public auction, growing out of the mere inadequacy of price, (even assuming for the moment, but not conceding, that the price really was inadequate), the party primarily aggrieved thereby, and who would have had the legal right to complain, was Schwab, (or his assigns, if any), who had lost the property and the equity therein; and not the Building Association, whose lien thereon or security merely had been foreclosed without any resulting financial advantage or return to it.

It does not appear, however, that Schwab, (or his assigns), complained that the property had been sold at an unfair or inadequate price; and the only way in which the alleged inadequacy of price is made out herein is the circumstance that a purchaser at private re-sale was found who, for purposes of his own, (and who owned other properties in the immediate neighborhood thereof), was willing to give a largely increased price for the property.

Again, and having in mind the fact that the only interest the Building Association had in the property was a mere lien or security for the repayment of advances theretofore made by it to Schwab, as above; and which lien or security was subsequently foreclosed by the sale to Wilson without any resulting financial advantage or return to the Building Association; it does not appear herein that Schwab was financially irresponsible, or that he did not own or possess other property or assets which could have been made to respond to his obligation and indebtedness to the Building Association, or that the latter either did or did not further pursue or press its claim against Schwab.

The theory of the present Receiver in this case, and under which

claim is asserted herein against Smith and Wilson, is, and, of course, must be, that the sale made to Wilson was good and effectual; but that, because of the arrangement entered into between the parties for a joint participation in the property, or its proceeds, in the event Wilson should become the purchaser at the sale thereof to be made at public auction, the net proceeds (profits) of the adventure are, in equity, impressed with a constructive trust in favor of the Building Association, so represented by its present Receiver herein, as above.

12 It is not entirely clear whether the claim made herein, by said Receiver, is that the parties to the joint enterprise, and in the event it be determined that they are liable herein, should be charged jointly and severally to the extent of the entire net proceeds (profits) realized, (namely, $790.90), or only to the extent that each one participating in the joint enterprise individually profited by the transaction, (namely, the sum of $263.63). However, in view of the conclusion reached herein, the matter is not of special importance.

Insofar as concerns the connection of the former Receiver, Ambrose, with the transaction embraced herein, nothing further need be stated, since his liability has been fixed in this cause by surcharging his accounts, on final statement and settlement, with the entire amount of the net proceeds, (profits), of $790.90, so realized upon the re-sale of the property, as above.

Therefore, the only question here for determination is, as to the liability, if any, and if so what, to the Building Association, (represented by E. Hilton Jackson, its present Receiver,) of the above-named Smith and Wilson for the net proceeds, (profits), aforesaid, or any part thereof.

The undersigned has carefully considered the authorities submitted by counsel on both sides of this controversy, and has, also, made an independent examination of the authorities; and, without here undertaking an analysis of the decided cases, it will probably suffice to say, for present purposes, that, so far as concerns Smith and Wilson, the persons sought to be charged herein, the situation is somewhat novel, and does not seem to be ruled by any of the authorities so submitted, nor by any of the additional cases examined by the undersigned; and while the question itself cannot be said to be free from doubt, it would seem that, under the particular facts and circumstances of this case, no liability should be adjudged herein against either Smith or Wilson in any sum or amount on account of the transaction aforesaid; and that conclusion of law is, accordingly, hereby submitted to the Court.

Respectfully,

A. A. HOEHLING, JR.,
Special Master.

Washington, D. C., April 19, 1917.

Fee of Special Master hereby submitted to the Court for its approval, $75.

Exceptions to Report of Special Master.

Filed April 28, 1917.

* * * * * * *

Now comes the Receiver, E. Hilton Jackson, by his attorneys, and excepts to the report of the Special Master herein filed on the 19th day of April, 1917, and as ground of exception says:

1. On the facts admitted by the respondents to the petition upon which said report is based, the Special Master has erred in
13 holding that said respondents are not liable for the whole amount claimed by the Receiver.

2. The Special Master errs in holding that it is not entirely clear whether the claim made herein by the Receiver is that the parties to the joint enterprise mentioned in said petition are jointly and severally liable for the entire net proceeds from the property involved, or that each one is liable only for his share, it being clearly shown that said claim is that they are severally and jointly liable for the whole.

W. W. MILLAN,
ROBERT H. TURNER,
Attorneys for E. Hilton Jackson, Receiver.

Opinion of Court.

Filed November 2, 1917.

* * * * * * *

The facts and the contentions of the parties are thus stated in the admirable report of the special master.

"There does not appear to be any very material disagreement as to the facts out of which this controversy arises. Briefly stated the facts are thus:

"William E. Ambrose was appointed Receiver in the above equity cause, on or about July 11, 1908, and was such Receiver during all of the times embraced in this controversy. During said times Mr. John Lewis Smith was one of the attorneys for said Receiver, although it does not appear that his duties as such attorney included anything in relation to sales of real estate made by trustees under deeds of trust securing advances or loans theretofore made by said Building Association. Furthermore, Mr. Smith expressly denies that he had any professional duty or connection with any of such sales, including therein specifically the sale of the certain property embraced in this controversy hereinafter referred to.

"The first Co-Operative Building Association at the time of the institution of the proceedings against it herein was the holder or owner of divers debts due to it from borrowing stockholders, to whom it had theretofore made advances of money, the same being secured by deeds of trust upon real estate; and, upon the appointment of

William E. Ambrose as Receiver, as above, said secured debts passed to him for appropriate collection and administration as assets of the Building Association; and among others thereof, was an indebtedness of one Frederick S. Schwab, in the sum of $2,700.00, to secure the payment whereof to said Building Association, the said Schwab executed his certain deed of trust, dated August 10, 1899 (recorded in Liber 2420, at folio 245, of the Land Records of the District of Columbia), conveying Lot No. 7, in Square No. 41, in the City of Washington, District of Columbia, to Jesse H. Wilson (since deceased), and Raphael A. Casilear, as Trustees.

"Thereafter the property described was advertised by Raphael A. Casilear, as surviving trustee under the above deed of
14 trust, and at the request of the party secured, for sale at public auction, on Thursday, June 16, 1910.

"On that occasion, Mr. Edwin L. Wilson bid *the* upon the property; the property was knocked down to him upon his bid of $350.00, which was at the rate of about 4½ cents per square foot, but the property was later withdrawn by the trustee upon the ground that the amount bid was inadequate.

"It seems that, immediately thereafter, the auctioneer, (Mr. Weschler), Mr. Ambrose, Mr. John Lewis Smith and Mr. Edwin L. Wilson walked down the street together; that the auctioneer remarked that any property in the City of Washington that could be bought for ten cents a foot or under was cheap property; that Mr. Smith stated to Mr. Wilson that if he wanted to bid again he would be willing to take an interest in the property if he, Mr. Wilson, should be the highest bidder; and Mr. Ambrose stated that he would go in too, in the event Wilson should become the purchaser at a second sale.

"The agreement between the parties named, Ambrose, Smith and Wilson, made in the informal way above referred to, and so far as it may be termed to have been an agreement, seems to have been thus: Wilson was to use his own judgment in bidding on the property at the second sale, both as to bidding at all and as to the amount of his bid; and if he should happen to become the purchaser thereof, the three persons named should be jointly liable for the purchase price and any expenses incident to the purchase of the property; and they should, also, be jointly interested in the property itself.

"On the following day, Friday, June 17, 1910, the property was again advertised for sale at public auction; the same to be held on Tuesday, June 28, 1910.

"Aside from the general and rather indefinite arrangement as to the possible purchase of the property by Wilson at a second sale, as the joint enterprise of the three persons named, nothing further appears, so far as concerns any concerted plan of action, other than the fact that, at such second sale, Wilson, in competition with one or more bidders, finally made a bid of $491.00 for the property, which was at the rate of 6½ cents per square foot, and the property was knocked down to him at that figure. The testimony discloses that Mr. Wilson offered to give his check as a deposit on account of said sale, but, in view of his known responsibility, the same was not required of him.

"It appears that Mr. Wilson made his bid for the property at the second sale in the exercise of his individual judgment, and without any previous conference with either Messrs. Ambrose or Smith; and that in bidding, he had in mind what the auctioneer had theretofore stated about City property at ten cents a foot or under being cheap property. Mr. Wilson has testified that in making said bid of $491.00 it was his understanding that the three persons named would contribute equally to the purchase price.

"It may be remarked that, while Mr. Ambrose and Mr. Smith were both present at the second sale, there is no evidence that Mr. Smith participated therein in any way, either in the conduct of the
15 sale or in the acceptance of the bid of Mr. Wilson; nor is there any evidence that Mr. Ambrose gave any instructions or directions to the auctioneer or trustee in regard to the matter; the testimony of the auctioneer being to the effect that the ordinary course at such sales is for him to take the final instructions of the trustee, although, because of the lapse of time, he had no definite recollection as to the matter in this particular case as to conferring with either Ambrose, (receiver) or Casilear (trustee).

"The following day, or possibly the day after, Mr. Smith communicated with one or more real estate men about the property, with the result that, under date, July 6, 1910, a deposit of $50.00 was made by Harry A. Kite with Allan E. Walker & Co., real estate agents (the latter being clients of Mr. Smith), for the purchase of said property for $1400.00, terms all cash; and that contract of purchase thereupon was approved and signed by Edwin L. Wilson as purchaser of the property at the deed of trust sale, as above.

"Later on it developed that there were taxes in arrear upon said property; that it had been sold for taxes and deeded to one Charles H. Wiltsie, and that it would require some $550.00 (as per compromise thereof arranged with said Wiltsie), to clear the property, which amount was some $59.00 in excess of the entire amount of Wilson's bid for and purchase of the property, as above; and, accordingly, Wilson agreed to advance his bid to the extent of the additional amount needed to free the property of taxes, etc., in order that good title thereto might be conveyed to Kite, free and clear of taxes, tax deeds, etc.

"The net result of the matter was that Raphael A. Casilear, as surviving trustee, conveyed the above described property to Edwin L. Wilson, by deed dated July 30, 1910 (and recorded August 25, 1910, in Liber 3357, at folio 150), upon the consideration therein stated of $489.75; and said Edwin L. Wilson (his wife uniting therein) conveyed the same property to Harry A. Kite (under the contract of purchase thereof at $1,400.00 supra, by deed dated August 12, 1910 (and recorded August 25, 1910, in Liber 3357, at folio 152).

"No money was actually paid or required to be paid by Wilson, the entire settlement of both of the above transactions having been accomplished through the re-sale made to Kite, and the payment by the latter of the agreed purchase price on re-sale of the property, as above.

"The consideration paid or agreed to be paid by Wilson was absorbed entirely in cleaning up the back taxes on the property, tax deeds to Wiltsie, etc.; and thus the Building Association derived nothing therefrom on account of the indebtedness aforesaid secured by deed of trust upon said property. On the other hand Wilson, under his re-sale of the property to Kite, realized a net profit of $790.90, and that sum thereupon was equally divided by him among the three parties jointly interested in the enterprise, as above, each receiving one-third thereof, namely:

William E. Ambrose	$263.63
John Lewis Smith	263.63
Edwin L. Wilson	263.63

16 "By report of Louis A. Dent, Special Master, filed in this cause December 6, 1915, the entire amount of the above profit, plus $5.00, aggregating $795.90, was charged against William E. Ambrose, Receiver, as one of the items making up the balance due by said Receiver upon the final statement and settlement of his accounts; this evidently upon the theory that the Receiver could not be allowed to make a profit in connection with any matters embraced within the receivership. That report was subsequently confirmed by the court. The surety on the Receiver's bond has made settlement to the full amount of its bond; but a large balance still remains chargeable against the Receiver on the general settlement of his accounts.

"In the brief filed herein on behalf of Messrs. Smith and Wilson attention is called to the fact that the present Receiver is now seeking a decree in this cause against said former Receiver, William E. Ambrose, for the full amount of the balance so found to be due upon the final settlement of his accounts, as above, including the item hereinabove mentioned, the same to operate as a judgment at law.

The Contentions of the Respective Parties.

"It is to be noted that counsel for E. Hilton Jackson, Receiver herein, disclaims any actual fraud in respect of the transaction hereinabove referred to; but insists that, because of the fact that Ambrose was Receiver of the property and assets of the First Co-Operation Building Association, and that Smith was one of the attorneys for said Receiver, it was legally impossible for Wilson, though an entire outsider, to have made any bargain or arrangement by which either or both of the above-named parties should be admitted by him to share in the property aforesaid, or in its proceeds, should he, Wilson, become the purchaser thereof at public sale; and that the profits realized from a joint enterprise entered into and engaged in by parties thus situated are, in equity, impressed with a constructive trust in favor of the present Receiver of the Building Association.

"On the other hand, counsel for Smith and Wilson insist that, in so far as Ambrose, as Receiver for the Building Association, may have been within the rule that absolutely prohibits and disqualifies him from receiving or making any profit out of the property or assets of the corporation then being administered by him, as such

Receiver that liability has been fixed and determined by decree in this cause surcharging his accounts on final settlement with the entire amount of the profits realized on the re-sale of the property, as above; but that, as to Smith and Wilson, there was no such prohibition or disqualification; and that, therefore, under the facts of this case, there is no liability on the part of Smith or Wilson."

It will be observed that the lot was encumbered for more than its value. The debt secured by the trust was $2,700.00 and the tax incumbrances amounted to more than $550.00, while the sale to Kite, which both sides treat as an excellent one, was for $1,400.00 only. So it is plain that the sale ordered by the Receiver was merely an attempt to realize something for the Building Association.

17 There was no possibility of a surplus to be paid to the owner of the equity. It was in substance a sale of property belonging to the Association, as much so as if the whole title had belonged to the Association. The sale was made by direction of the Receiver as representing the Association, which had a right to require the trustee to sell. Whether the Association itself would have been entitled to bid on the property if it had been doing business at that time, is not the question. Whether the Receiver, if he had been so authorized by the court, might properly have bid upon the property in the interest of the Association, is not the question. Neither of these things happened. What happened was that the Receiver, jointly with Smith and Wilson, bid for the property in their own private interest. That is to say, the Receiver in the name of another, purchased this property for himself at the same time that he was having it sold through the holder of the legal title, for the real owner, the Association which he represented. His duty as Receiver was to use every proper means to have the property sold at the highest price obtainable. His interest as a purchaser was to have it sold as low as possible. And, moreover, he was a secret purchaser, bidding in the name of another. How can it be denied that his conduct was a palpable violation of his duty, or that any profit which he made by thus purchasing and afterwards reselling the property belonged to the estate he represented? Smith and Wilson knew the Receiver's relation to the property and to the sale. Their own testimony, returned with the Master's report shows this. They were charged with knowledge that the Receiver could not legally become the purchaser of this property in such circumstances. Yet they made him a joint purchaser with themselves. Each of the three became liable for the whole price bid and the three stood as one person in the eye of the law in making the purchase. They entered into a joint speculation in the trust property, to share equally in the profit or the loss. It was a speculation which one of the joint speculators was forbidden by law to engage in, as they knew. They knew that if he made any profit it would belong to the estate. How then can the law pronounce their conduct innocent? Knowing the facts which made it illegal for the Receiver to become a party to their speculation, they knew the consequences of those facts, and they knew that his act was unlawful. When they joined with him in an effort to make a profit out of the property which he held in trust and which they knew he had no right to deal with in that way, did they not become joint wrong-doers with him?

It has been argued in this case that Ambrose had a right to purchase at this sale because it was a sale, not by himself, but by another, viz. the trustee under the trust deed. That fact, it seems, is of no consequence inasmuch as he represented the estate for whose benefit the sale was being made, and was bound to do all he could to have the property bring the highest price. Upon this point we are referred to Hayes v. Hall, 188 Mass., 510. There the trustee of a fund which included a second mortgage became a purchaser, 18 for his wife, of the mortgaged property at a sale thereof made under the first mortgage, buying it for $150,000.00 when it was worth $200,000.00. He was not instituting or conducting the sale, yet his duty, as representing the owners of the junior incumbrance, was to have the property sell for all it was worth, and it was held that if he was really buying for the purpose of procuring some advantage to himself, although in the name of his wife, he was chargeable with the profit.

We have not overlooked any of the cases cited by counsel for the defendants. (Michoud v. Girod, 4 How., 503; Hammond v. Hopkins, 143 U. S., 224; Twin Lick Oil Co. v. Marbury, 91 U. S., 591; Allen v. Gillette, 127 U. S. 589; Pac. R. R. Co. v. Ketchum, 101 U.S., 289; Starkwether v. Jenner, 27 Appeals, 348.) We are aware that a sale to a trustee is now held to be voidable rather than void. But we find nothing in any of the cases to indicate that a sale made under the circumstances of this sale, to one standing in the position of Ambrose, would be stamped with the approval of the court.

Ambrose, Smith and Wilson are found to have been joint purchasers. The relation between joint contractors is thus stated by Parsons in his work on Contracts, pp. 21-25; "Parties are not said to be 'joint' in law merely because they are connected together in some obligation or some interest which is common to them both: they must be so connected as to be in some measure identified. They have not several and respective shares which being united make a whole; but these tog-ther constitute one whole, which, whether it be an interest or an obligation, belongs to all. Hence arises an implied authority to act for each other which is in some cases carried very far". It is necessary to keep this relation clearly in mind in considering the question presented by this case.

If the title to this land stood now in the names of Ambrose, Smith and Wilson, and the present receiver were seeking to have the conveyance set aside and to recover the title, could it be contended by Smith and Wilson that the title was in them, or that any part of it should be held good in them? Would their title be any better than the title of Ambrose, one of their joint tenants? Were they not assisting him in procuring a title which the law would not allow him to take, and having taken the title jointly with him, would it not be held in equity? See Johnston v. Little, 141 Ala., 382.

If this had been a case of actual fraud on the part of Ambrose, instead of a case of constructive fraud, only, there can be no doubt that Smith and Wilson, by joining with him in the purchase, with knowledge of the facts, would have made themselves constructive trustees of the profit. Bunnel v. Stoddard, 4 Fed. Cases, p. 667,

Case No. 2135. But can it make any difference in law whether they assisted him to commit a fraud in fact or whether they knowingly assisted him to do what the law declared to be a fraud? Upon the point we think the counsel for the new receiver is justified in quoting the language of the Court of Appeals of Virginia in *Jackson* v. Updegraffe 1 Robinson, at p. 129: "Parties dealing with an executor or trustee, and cooperating with him in the misapplication of assets or trust funds, in violation of the duties of the executor
19 or in breach of the trust, cannot use such transactions as a defence against the claims of creditors, legatees or cestuis qui trustent: and the application of assets or trust funds by the executor or trustee to the discharge of his individual responsibilities, is, unless the estate or trust be indebted to the executor or trustee, a violation of duty or breach of trust". Such action is, is it not, a constructive fraud upon the estate? Loring v. Salisbury Mills, 12 Mass., 138, is instructive. There a bank having notice that certain shares of its stock were held by one as trustee for another, issued a new certificate therefor to a purchaser from the trustee, without inquiring as to the terms of the trust. If it had inquired it would have learned that the trustee was acting in this respect without authority. It was held that the bank was bound to have inquired, and that the bank as well as the trustee was liable to the cestui qui trust. It was also held that the proof of the claim against the estate of the trustee, who had deceased, was not an affirmance of the validity of his act and was no bar to a suit against the bank, beyond the amount of the satisfaction received by way of dividends from the estate of the deceased.

It is held that a third person, taking a conveyance from an express trustee and having knowledge of the trust, becomes a constructive trustee. Smith v. Dalls etc. Co., 70 Se., 662.

One who participates with a trustee in a misappropriation of the trust fund is liable jointly and severally for the fund so misappropriated, according to Jones v. Abraham, 75 Va., 463. And in Woodell v. Bruff's Heirs, 25 W. Va., 465, it is held that any person who conspires or unites with one holding a fiduciary position to do any act contrary to the duty of such fiduciary is equally liable with the fiduciary himself. In Georgia the law upon the subject is thus codified, Par. 3200: "One who knowingly assists a trustee in misapplying trust funds shall be directly responsible to the person injured".

We have been referred to Enslen v. Allen, 160 Ala., 529. That is an interesting case well decided and well reasoned. Allen and Mrs. —— Enslen agreed to purchase together a piece of land, the title to be taken in Mrs. —— Enslen's name, but held by her for the two in equal shares. Mr. Enslen signed the contract for the purpose of assenting to his wife's action, agreeing to join her in a conveyance which should put the title in Allen and Mrs. Enslen when Allen should have paid his part, and, also accepted the position of agent for Allen and Mrs. Enslen in managing the land, collecting the rents, etc. There was a mortgage upon the property which it was understood should remain thereon, the equity only being pur-

chased. Mr. Enslen, it seems, brought about a foreclosure sale of the property and became the real purchaser through the instrumentality of another person who took the title and then conveyed it to Mr. Enslen. Allen brought a bill against Enslen and his wife to compel a conveyance to him of his one half interest and for an accounting. The bill was sustained on the ground that the right to a conveyance existed as well against the husband as against the wife, the husband having knowledge of the trust relation sustained by his wife, and, also, on the ground that the husband's relation as agent for the management of the property and the collection of its rents incapacitated him from becoming the purchaser of the property at a foreclosure sale which he had brought about and hastened to the disadvantage of his principal, the plaintiff. It was to some extent a case of actual fraud on the part of Enslen, but it was also a case in which it was considered that Enslen was affected with the same incapacity as his wife to hold the property against the plaintiff because of his knowledge of the relation existing between his wife and the plaintiff. "The equity of the bill", said the court, "must rest upon the proposition that he acquired title in fraud of the complainant's right, and so must be treated as a trustee for the complainant". That case does not correspond with the one in hand in one respect,—namely, that Smith and Wilson did not primarily stand in any trust relation. But they knew of the trust relation sustained by Ambrose, knew that it was a violation of his duty to become a purchaser, and yet took him into their quasi partnership and made themselves one with him in the joint purchase. May one rightfully become a joint purchaser with another of property which he knows that other has no right to purchase? Is not the joint purchase tainted as the separate purchase by the trustee would have been?

The president of a corporation was also a trustee under a marriage settlement. He sold the trust property in violation of his trust and purchased it for the corporation. The corporation as well as the trustee was held liable. A decree against the trustee having proved unavailing, the property in the hands of the corporation was properly resorted to. "A purchaser concerned in a fraudulent breach of trust and actively participating in it, and converting the property to his own use incurs the like liability with the fraudulent trustee." Such was the case and the decision in Barksdale vs. Finney, 14 Gratt. 338.

A husband having no authority, as the bank knew, to check out his wife's funds except on her own business, was allowed by the bank to check it out on his own business. The bank was held liable equally with the husband. Pearce vs. Hill, 149 Ind., 136.

A guardian who lends the money of his ward without security is liable as for a breach of duty, and the borrower, if cognizant of this breach of duty, has been held to be a trustee in invitum, equally liable with the guardian himself, and in a trust capacity. Lee vs. Lee, 67 Ala., 406, 422.

It is insisted, also, that Smith and Wilson are released by reason of Ambrose having been held liable for the whole amount. But if

Smith and Wilson are liable they remain liable until satisfaction has been obtained; and the record fails to show that satisfaction has been obtained. It is true that Ambrose has been held liable for this amount as part of a much larger amount due from him as receiver, and that his surety has paid a part of such indebtedness. It does not appear that he has ever paid this part, and the part remaining unpaid is far in excess of the amount for which the defendants are liable with him. It is evident that there was never any application of the surety's payment to the discharge of this part of Ambrose's liability; nor was there ever any intention of releasing these defendants. On the contrary, the court in confirming the auditor's report saved and reserved to the new receiver all such rights.

While it seems necessary thus to hold these defendants jointly for the full amount of the profits obtained by the resale, it ought to be clearly stated that these defendants are not believed by the court to have been conscious of any wrong doing. They acted under a misapprehension of their legal duty.

WENDELL P. STAFFORD,
Justice.

Motion to Strike Exceptions, Deny Decree and Dismiss Petition.

Filed November 14, 1917.

* * * * * * *

Now comes John Lewis Smith and Edwin L. Wilson, persons mentioned in this cause, in their proper persons, and move the Court to strike from the files and vacate the exceptions filed by E. Hilton Jackson, the Receiver herein, to the report of Adolph A. Hoehling, Special Master; to vacate the references to said Special Master, and to deny any degree based upon said exceptions, or reviewing the finding of said Special Master upon said exceptions or otherwise considering the same; and to dismiss the petition of the Receiver in this cause upon which said reference was had and strike from the files the answer thereto of the said John Lewis Smith and Edwin L. Wilson; and for cause therefor they say as follows:

One. Because this Court is without jurisdiction, in this proceeding, to hear and determine any alleged claim of the said Receiver against these movants and particularly the matter of the claim against these movants which is the subject of said report.

Two. Because the submission of these movants to the consideration by said Special Master and to the reference of the said cause to him was secured by the said Receiver in the following manner, that is to say, that it was agreed by said Receiver, on the one hand, that he would not file or make or take any exception to such report as such Special Master might file after due hearing; and, on the other hand, it was agreed, in consideration thereof, by these movants, that they would abide by and perform the award of the said Special Master without regard to any right to have a review of the same,

or to object to the jurisdiction of the Court; whereas, the said Receiver has, in fact, excepted to said report, without direction by the Court so to do, and without first seeking instructions from the Court, upon the facts, including those set forth herein, whether they should file and make said exceptions, in the light of said agreement and of the doubtful questions of law involved; wherefore the submission aforesaid was conditional on the part of these movants and they are relieved by the breach of condition.

JNO. LEWIS SMITH.
EDWIN L. WILSON,
In Proper Person.

22 *Affidavit of James S. Easby-Smith.*

* * * * * * *

DISTRICT OF COLUMBIA, to wit:

James S. Easby-Smith, being first duly sworn, on oath says, he acted as the representative of John Lewis Smith and Edwin L. Wilson in connection with the claim of the receiver in this case that said Smith and said Wilson were liable to make good to said receiver the amount of profit represented by the difference between the price obtained at the sale to Edwin L. Wilson of lot even (7) in square forty-one (41), and the price obtained by the resale of same to Harry A. Kite. After the matter had been the subject of hearings before the then Auditor of this Court this affiant, on the one hand and the receiver, E. Hilton Jackson, and his Attorney, W. W. Millan, on the other hand, entered into negotiations looking to the reconcilement of their differences of opinion whether legally or morally said Smith and said Wilson, or either of them should make good to said receiver or pay to him the profit obtained by said sales. It was finally agreed by said Jackson and said Millan, on the one hand, and by affiant in behalf of said Smith and said Wilson, on the other hand, that they would submit to a decision of the question by Mr. A. A. Hoehling who, to carry out said agreement, should be appointed first as an Arbitrator, but, upon objection of the Court and after answer filed, as a Special Master. Said parties, as a condition to said submission, each on his side, agreed that they would abide by whatever conclusion the Special Master should announce and that the understanding to so abide should be a gentleman's agreement between them. When the order referring the cause to the Special Master was presented to the Court the presiding judge was advised of said agreement, but announced that he felt the Court should not yield control of the matter but should reserve the authority to review the same, and so provided in said order, further providing that, to the end of reserving and exercising such authority, either of said parties should have the right to file appropriate exceptions or objections to such findings if so advised. While it was appreciated that the Court was properly in its right to make such reservation, nevertheless the original agreement between counsel was expressly understood to remain in force and so specific-

ally stated. Upon the coming in of the report of the Special Master, the receiver advised the Court of the agreement not to except thereto, but nevertheless filed the exceptions herein, without any previous application to the Court for instructions in the premises.

Affiant further says that solely in reliance upon the receiver's willingness to rely upon Mr. Hoehling's judgment as to propriety and legality of the transactions involved, and the said receiver's agreement to abide thereby to the extent of filing no exceptions thereto, he and those whom he represented waived all defenses other than the actual and constructive good faith of said transactions, and did not assert or avail themselves of other defenses. Affiant does not assert that it was intended in any way to attempt to bind the
23 arm of the Court by the agreement aforesaid, in the event that the Court, being of opinion that the finding of the Special Master was so at variance with the equities and right of the matter, should of its own motion exercise its authority to review the same, notwithstanding the agreement of the said receiver.

Affiant further says the proper aspect of this case in this respect has never before been presented to the Court or made a matter of record, but, on the other hand, the exceptions have been depending under advisement of the Court for a quite long period without anything of record or otherwise suggested, so far as he is advised, to acquaint the Court with the circumstances of the original submission or the agreement and understanding on which the same was based. Affiant attaches hereto a letter from counsel for the Receiver dated April 27, 1917.

JAMES S. EASBY-SMITH.

Subscribed and sworn to before me this 13th day of November A. D. 1917.

J. ELIOT MORAN,
[SEAL.] *Notary Public, D. C.*

Millan & Smith,

Attorneys and Counsellors at Law,

Rooms 202-204,

Columbian Building, 416-418 Fifth Street, N. W.,

Washington, D. C.

April 27, 1917.

Mr. James S. Easby-Smith, Woodward Building, Washington, D. C.

DEAR SIR: I enclose exceptions in the Ambrose matter signed by Mr. Turner and myself.

I have though- about what you said to me the other day at the Bar Association very carefully and really the most important point involved, from my standpoint, is not the subject matter of the excep-

tions but my attitude toward them. I would certainly regard any agreement made by me, whether in writing or not, and whether in definite form or not, as binding. I recall distinctly that we were all willing to have an order passed to make Mr. Hoehling's findings final, but the Court declined to do this. Your recollection is that there was something said after the Court had acted about a gentleman's agreement that the findings of the Master should still be final and I am not prepared to say you are mistaken. My recollection is not clear as to whether the conversation was after the Court had acted or before. Whatever I said then ou-t to bind me or my client so far as I had the right to bind him.

The Receiver thinks that he has not the right to agree not to except to the report as he would by that course do what the
24 Court said he could not do, namely, make the Master's report final, virtually by agreement. He thinks he would be treating the Court with disrespect and that he would properly subject himself to criticism on the part of some of the creditors who are watching the case rather closely.

Very respectfully,

W. W. MILLAN.

Affidavit of W. W. Millan.

Filed November 23, 1917.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

William W. Millan being duly sworn upon his oath says: Regretting the necessity which seems to compel him, while counsel in the case, to file an affidavit therein made by himself, makes and files this affidavit in answer to the motion of respondents John Lewis Smith and Edwin L. Wilson and the affidavit of their counsel, Mr. J. S. Easby-Smith in support thereof and for the purpose of denying that the agreement to submit the claim of the Receiver herein against said respondents to a Special Master and to the Court in the manner in which it has been submitted and considered, was obtained by any misrepresentation or through any misunderstanding or was conditional, or that said respondents or their counsel have been misled thereby. Fortunately, most of the matters to be touched upon in this affidavit are of record and need only to be summarized and connected here.

The negotiations in regard to this matter were all brought about by the solicitude of counsel for said respondents who expressed himself as being desirous that there should be as little publicity as possible given to a matter which might subject his clients to severe criticism. It is true that the Receiver and his counsel were willing, out of consideration for respondents, that the claim might be submitted to an arbitrator or arbitrators whose award should be final, but after mature consideration concluded that the Receiver had not the authority without leave of Court to make an agreement that such award

should be final. There was no concealment of this conclusion and no fact in connection with it was withheld from counsel for said respondents. All of said negotiations were conducted by the Receiver and his counsel Mr. Robert H. Turner and this affiant on the one hand and Mr. J. S. Easby-Smith for the respondents on the other. The conclusion finally reached was submitted to the Court by the Receiver, in his report filed herein on December 1, 1916, in the following language, as to which counsel for said respondents was fully advised, viz:

"Your Receiver is entirely willing that the matter may be thus arbitrated and believes that such a disposition of it would be as speedy and satisfactory as any other. He recommends to the Court that said arbitration be authorized if the Court is of the opinion that such course may be lawfully taken, as to which he asks the Court to instruct him. If such arbitration is allowed your Receiver and the representatives of Messrs. Smith and Wilson will agree upon an arbitrator and submit his name to the Court when the order of reference is passed."

Affiant respectfully represents that this fully denies and disproves the allegation of the affidavit filed in support of the aforesaid motion in its statement.

"It was finally agreed by said Jackson and said Millan, on the one hand, and by affiant in behalf of said Smith and said Wilson, on the other hand, that they would submit to a decision of the question by Mr. A. A. Hoehling, who, to carry out said agreement, should be appointed first as an arbitrator but, upon objection of the Court, and after answers filed, as a Special Master. Said parties, as a condition to said submission, each on his side, agreed that they would abide by whatever conclusion the Special Master should announce and that the understanding to so abide should be a gentleman's agreement between them."

When the matter was presented to the Court, the Receiver, through his counsel, specifically stated to the presiding Justice, that he was willing to have the case submitted to a Special Master or to an arbitrator or arbitrators, whose finding or award should be final, thereby adhering in the strictest good faith to the spirit of said negotiations and the letter and spirit of his said report, but the said presiding Justice announced that the Court could not and would not relinquish its control of the case by surrendering its final authority to an arbitrator or Special Master. After the Court made this announcement, this affiant prepared and handed to Mr. J. S. Easby-Smith, a rough memorandum draft of an order referring the controversy in accordance with the views expressed by the Court, but this was not entirely satisfactory to Mr. Easby-Smith who thereupon prepared and sent this affiant a draft of the proposed order of reference in the very language in which said reference is made by the order herein passed on the 8th day of December, A. D., 1916, under which all subsequent proceedings have been had, and which expressly reserves to all parties the right to file exceptions and makes no reference to

any supposed necessity of obtaining leave of Court to file such exceptions. Said memorandum draft prepared by said Easby-Smith is hereto attached, marked "Exhibit No. 1" and is made a part of this affidavit.

This draft and the order into which it was carried were both prepared and the said order was signed, with the full knowledge on the part of counsel for the said respondents of the views of the Court which the order itself so fully and clearly expresses, said views having been announced in open Court in the presence of counsel on both sides. Affiant respectfully suggests that as the matter was first submitted to the Court with a recommendation by the Receiver that the Court itself, give the Arbitrator or special master final powers, it is not apparent why there should have been any discussion of an agreement not to except to the report of such arbitrator or special master and there was then no such discussion or agreement;
26 on the other hand, the entire discussion was in the direction of having the Court give the arbitrator or special Master final powers, thus obviating all necessity for the Receiver to make any such agreement. Furthermore, the Receiver and his counsel, both in the oral negotiations and in the aforesaid report, expressly disclaimed any right on the part of the Receiver to make any agreement without leave of Court.

Affiant expressly denies that any agreement was ever made by him, or to his knowledge, by said Receiver, that there should be no exceptions to the report of the Special Master, or that any such agreement — ever entered into or was a consideration for the submission of said controversy to Special Master Hoehling or any other proceeding in connection therewith. After the Court had announced its views and after affiant had handed to Mr. Easby-Smith a draft of an order substantially in accord with the aforesaid Exhibit No. 1, affiant, as he now recollects, after mature reflection on the whole matter, said voluntarily, in expressing his regret that the Court had not seen its way clear to make the reference with final powers to the Special Master, that it might be possible to find a way not to except to the report; his present recollection of the exact remark is that it was "that it might be possible to have a gentleman's agreement not to except." No such agreement was ever made and no such consideration entered into the signing of said order. When the conversation referred to in the letter of this affiant to Mr. Easby-Smith which has been brought into the record by him in his affidavit took place, there was no claim made by said Easby-Smith that he had submitted to the arbitration or taken any other step on the basis of any supposed agreement with this affiant or his client, but merely that affiant had said he would not except and that he ought to stand by that statement. Whereupon affiant wrote said letter expressing his willingness to stand by any agreement which he had the right to make and had made but not admitting that any had been made, and without any thought that a personal letter would be used in the manner in which it is now attempted to use his said letter.

W. W. MILLAN.

Subscribed and sworn to before me this 20th day of November, A. D., 1917.

GEO. W. REIK, [SEAL.]
Notary Public, D. C.

"EXHIBIT No. 1."

5. That this cause, in so far as it involves the differences between the Receiver and Messrs. John Lewis Smith and Edwin L. Wilson in the matter of the sale of Lot 7 in Square 41 in the City of Washington, District of Columbia, to Edwin L. Wilson, be and it hereby is referred to —— ——, as a Special Master, with instructions to hear and adjudicate the entire matter of said differences, both as to the facts and the law. The said Special Master shall con-
27 sider the testimony relating to said matter, which has already been taken before Louis A. Dent, Esquire, Former Auditor and Special Master, and his report thereon, as fully as if said testimony were newly adduced, and also any statement of facts which may be agreed upon and signed by the said Receiver and the said John Lewis Smith and Edwin L. Wilson; and the Receiver and the said John Lewis Smith and Edwin L. Wilson shall have the right to adduce, before the Special Master herein appointed, such legal and competent testimony as they may respectively desire to adduce. The said Special Master herein appointed shall report to the Court his findings of fact and conclusions of law, together with such statement of account as he may find to be necessary and proper. With the reservation, however, of the right to a review by the Court of the said Special Master's report, both as to findings of fact and conclusions of law, for which purpose all parties shall have the right to file exceptions within the time prescribed by the rules of the Court.

Affidavit of E. Hilton Jackson, Receiver.

Filed November 23, 1917.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

E. Hilton Jackson being duly sworn upon his oath says: He is the Receiver in the above-styled cause. He has read the affidavit of J. S. Easby-Smith herein filed in support of the motion of John Lewis Smith and Edwin L. Wilson to strike from the files the exceptions of this affiant to the report of the Special Master A. A. Hoehling, Jr., and knows the contents thereof. As stated in said affidavit, this affiant participated in the negotiations looking to a submission to arbitration of the controversy between himself and Messrs. Smith and Wilson, but only up to the time the same was submitted to the Court by his report herein filed on the first day of December, 1916. Affiant expressly and emphatically denies that he, or to his knowledge or by his authority his counsel, ever agreed that he would submit to a decision of the question involved in said controversy by Mr.

A. A. Hoehling, Jr., as an arbitrator or Special Master and would abide by whatever conclusion the Special Master should announce. On the contrary, in the negotiations with J. S. Easby-Smith, in all of which affiant and his counsel Messrs. R. H. Turner and W. W. Millan participated, affiant definitely and positively stated that while he was willing, out of consideration for Messrs. Smith and Wilson, to submit the case to arbitrators with final authority and power, he could do nothing without the sanction of the Court and it was "finally agreed" so far as this affiant was concerned and so far as he knows, not as stated in said affidavit, but as set forth in his said report, in which report he, in perfect good faith, expressed to the Court his willingness that arbitration might be final, and it was never "finally agreed" in any other way. When the Court declined to make a reference with final power to the arbitrator, and a
28 decree was signed by consent of all parties referring the cause in accordance with the Court's views, with right to both sides to except, affiant supposed that to be the conclusion of the whole matter except for proceeding regularly under said order.

E. HILTON JACKSON.

Subscribed and sworn to before me this 20th day of November, A. D. 1917.

C. CLINTON JAMES, [SEAL.]
Notary Public.

Opinion of Court.

Filed January 23, 1918.

* * * * * * *

After the former opinion had been filed, but before a decree had been rendered, a motion was filed, by the defendants to this petition, to dismiss the petition and hold all proceedings thereunder to be void and of no effect upon two grounds, viz: (1) for that the court never had any jurisdiction of the subject matter involved in said petition inasmuch as the petition showed upon its face that the petitioner's remedy at law was plain adequate and complete, and (2) for that the defendants had been induced to consent to a reference of the cause to a special master by such representations on the part of the petitioner's counsel as that it would operate as a fraud upon the defendant if the court should now undertake to review the conclusion of law reached by the special master, which was in favor of the defendants. More particularly stated, the second ground was that the defendants had originally agreed with the receiver's counsel that the findings and conclusions of law of the master should be final; that the court had declined to refer the case upon those terms and had insisted that if the case were referred such findings and conclusions should be subject to review by the court; that thereupon counsel for the defendants and counsel for the receiver had agreed that the case should be referred in the manner required by the court but that neither party should file any exceptions to the master's report, and that the reference was accordingly made upon such understanding, which was characterized by counsel among themselves as "a gentleman's agreement;" that, notwithstanding this agreement, counsel for

the Receiver had filed exceptions to the report which the court was about to sustain, thus overruling the conclusion of law reached by the master. In support of the second ground the defendants filed affidavits which were met by counter affidavits on the part of the receiver and his counsel.

It is urged by the defendants that the court was so totally without jurisdiction of the subject matter that no consent of the parties and no course of proceedings could authorize the court to render a decree upon the merits. It must be admitted that there are subject matters that are so utterly beyond the jurisdiction of a court of equity that nothing could authorize the court to proceed therein. For
29 examples: an indictment for a crime, an action of trespass quare clausus fregit. But certainly a petition seeking to hold the defendants as constructive trustees for a sum of money received by them as the profits upon the sale of property being administered by that very court is not such a case. In order to show that the court is totally without jurisdiction it is not enough to point out that the relief sought is the recovery of a sum of money, or a judgment for a sum of money, for equity not infrequently renders such decrees in proper circumstances. Admitting for the present, for the purposes of argument, that the petitioner might have proceeded at law and that the legal remedy would have been plain, adequate and complete, the questions are, (1) whether in any circumstances a court of equity may still take cognizance of the case, and, if so, (2) whether the circumstances of this case permit it. Fortunately the first question has been answered clearly and decisively in this jurisdiction, both by our own Court of Appeals and by the Supreme Court of the United States. In Reynes v. Dumont, 130 U. S., 354, such a question arose and was disposed of against the objection of the defendant, the court remarking, at p. 394, "We think we ought not to regard with favor the raising of this objection for the first time at this stage of the case," and quoting with approval the following passage from Daniell's Chancery Practice, Vol. I, p. 555 (4th Am. Ed.): "If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject matter." In the present case it can hardly be said that the court was not competent to render a decree requiring the defendants to pay to the petitioner the amount of the profits which they had realized as constructive trustees, nor that a court of equity had no jurisdiction of such a subject matter. In Reynes v. Dumont, supra, the court closed its opinion with these words: "The doctrine of this and similar cases is that the court for its own protection may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested; but it by no means follows, where the subject matter belongs to a class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case

it comes altogether too late, even if, if taken in limine, it would have been worthy of attention." Other cases in the highest court recognizing the same rule are, Kilbourn vs. Sunderland, 130 U. S., 505, 514; Tyler v. Savage, 143 U. S., 79; Brown v. Lake Superior Iron Co., 134 U. S., 530, 535; Insley v. U. S., 150 U. S., 512; Perego v. Dodge, 163 U. S., 160; Southern Pacific R. R. Co. v. U. S., 200 U S., 341, 349.

In Tyler v. Moses, 13 App. D. C. 428, our own Court of
30 Appeals had to deal with a similar question and followed the above cited cases, quoting with approval the same passage from Daniell's Chancery Practice. The case was one in its general feature of a class over which equity had and exercised jurisdiction although such jurisdiction might be denied in a particular instance only because the remedy at law had become adequate and complete. No objection to the jurisdiction had been raised until the final hearing, and the remedy at law had become barred by lapse of time. "Under such circumstances," the court said, "we think the objection comes too late." In the later case of U. S. Trust Co. v. Blundon, 42 App. D. C., 500, the same court adhered to its decision in Tyler v. Moses, saying: "The objection to the jurisdiction of equity came at a late stage of the proceeding. It was not raised by motion to dismiss, but reserved until the evidence had been heard and the argument begun. The allegations of the bill and prayers for relief bring it within the class of cases in which equity has always exercised jurisdiction. The objection comes too late to require an analysis of the evidence to determine whether there was a complete and adequate remedy at law."

The first point being thus settled, viz., that where the cause is of equitable cognizance, that is to say, one of a class in which equity has been accustomed to exercise jurisdiction, and a case in which it is competent for a court of equity to render the decree asked for, the objection that the moving party had an adequate remedy at law is an objection which the court is not obliged to recognize, but may treat according to the circumstances, we come to the second question, which is, whether the circumstances of the present case are such that the court ought now to refuse to render a decree and ought to dismiss the proceeding. The defendants insist that to refuse to dismiss is to deprive them of their right to a trial by jury; but it is proper to observe that the report of the master discloses no controversy of fact. He has found the facts in accordance with the defendant's own testimony and the only question is one of law. How then could the defendants be aided by a jury trial? The question of the defendants' liability would still be one to be determined by the court upon the conceded facts. In Pease v. Rathbun-Jones Eng. Co., 243 U. S., 273, 279, 280, it was held that objections that a summary judgment on an appeal bond was not preceded by notice and deprived the sureties of the right of trial by jury were waived by invoking the trial court's decision of the merits upon an undisputed state of facts, citing St. Louis & San Francisco Ry. Co., v. McBride, 141 U. S., 127; Western Life Indemnity Co. v. Ruff, 235 U. S., 261, 273. It is necessary, also, to notice the lapse of time. Unless this is a case to which the statute of limitations does not apply by reason of the strict trust relation which the defendants sustain to

the money sought to be recovered, the remedy at law is now barred. If the relation is so strictly a trust relation that the statute of limitations would not apply, it would seem to be a proper matter of equity cognizance. Moreover, for the same reason, the course taken by the defendants would seem to make their present request inequitable. They consented that the question should be tried and
31 determined in this court. They agreed upon the person appointed as a master; they participated in the trial before the master, and when the report came in and was considered by the court upon the exceptions filed by the petitioner to the conclusion of law reached by the master they participated in the written argument upon these exceptions, submitting the case to the court upon the careful brief which they had used before the master. They raised no objection to the court passing upon the exceptions, but waited and took their chance of a favorable decision by the court upon the master's report and the exceptions thereto; and it was not until the court had filed its opinion, reaching a conclusion of law in opposition to that of the master and contrary to their contention, that they ever suggested to the court any doubt concerning its jurisdiction. In such circumstances ought the court to grant their motion?

Although it may seem necessary to do so, it may be well to refer to some of the many federal cases in which the court has declined to heed an objection of this character, in the exercise of a sound discretion. In Lawson v. Barber & Co., 189 Fed., 165, the court sitting in equity refused to dismiss the bill and proceeded to dispose of the case upon its merits, although the plaintiff might have, and indeed should have proceeded at law for a breach of warranty; the reason being that on the first argument of the case the court had refused to dismiss the bill as having been brought improperly in equity, and thereafter the case had been tried in the equity court, and years had elapsed, so that it was no longer possible for the plaintiff to proceed at law.

In Hawkeye Gold Dredging Co. v. State Bank of Iowa, 157 Fed. 253, the plaintiff corporation was seeking to recover in equity from the defendant bank the amount of money which had been deposited therein by the plaintiff's treasurer, who was also the defendant's president, in his own name, but which money really belonged to the plaintiff. The plaintiff claimed that the bank had notice of the facts yet had converted the money to its own use by applying that amount upon a debt which it held against another. Objection was made by the defendant that the plaintiff's remedy was at law, but the court held otherwise inasmuch as the bill sought to hold the defendant upon the theory that although the money received by it became its money in law, that is, so far as the legal title was concerned, yet that in equity it was, to its knowledge, the money of the plaintiff. No specific money was claimed in that case any more than in this, and a judgment at law would have accomplished the same purpose as a decree in equity. Yet this did not deprive the equity court of jurisdiction. The court cited Insurance Co. v. Bank, 104 U. S., 54, and Union Stockyards Bank v. Gillespie, 137 U. S., 411. It said, moreover: "But if defendant deemed the complainant's remedy, if any existed, complete at law, it should have challenged the jurisdiction

upon that ground before entering upon its defence; and not having done so the court will proceed to a decree without stopping to inquire if there might not also be a remedy at law, the subject matter as alleged being of equitable cognizance. Kilbourn v. Sunderland, 130 U. S., 505, 514; Tyler v. Savage, 143 U. S., 79. The objections to the jurisdiction are, therefore, deemed to be untenable". This decision was affirmed by the circuit court of appeals. 177 Fed. 164.

In Williamson v. Monroe, 101 Fed., 322, 329, objection having been made that although the suit had been brought for a partnership accounting, the remedy at law was adequate in respect to one of the contracts involved, the court said that, having properly taken jurisdiction, it would in accordance with the rule of equity settle the whole matter, but added: "Moreover it is the settled law in the federal courts that where it is competent for a court to grant the relief sought, and it has jurisdiction of the subject matter, the objection that there is an adequate remedy at law should be taken at the earliest opportunity and before defendants enter upon a full defense".

In U. S. v. Southern Pac. R. R. Co., 117 Fed., 341, and (on appeal) 133 Fed., 651, the rule of Kilbourn v. Sunderland, supra, was quoted and followed, although it was strongly urged by the defendants that the usual rule requiring defendants to make early objection did not apply inasmuch as the bill showed upon its face that there was an adequate remedy at law.

In McCloskey v. Pacific Coast Co., 160 Fed., 794, the circuit court of appeals concludes by saying: "Conceding that the plaintiff had an adequate remedy at law against the intrusion by the appellant upon its possession, it nevertheless appears from the record that no objection to the relief sought by the bill was interposed, either by demurrer or answer, on the ground that the appellee had an adequate remedy at law. This being the case, it must be held that such objection is waived, for the case is not one over which equity could have no jurisdiction, since, under proper averments, trespass may, in exceptional cases be enjoined. Where it is competent for a court of equity to grant the relief prayed for, and it has jurisdiction of the subject matter, the objection that the complainant has an adequate remedy at law must be taken at the earliest opportunity; otherwise it is waived". An equally strong statement of the rule will be found in Hapgood v. Berry, 157 Fed., 807, 812. Other federal cases in point are Dederick v. Fox, 56 Fed., 714, 718; Waite v. O'Neil, 72 Fed., 348, 351, 352; Toledo, &c. Scale Co. v. Computing Scale Co., 142 Fed., 919; Quirk vs. Quirk, 155 Fed., 199, 201; Acord v. Western Pocahontas Corporation, 156 Fed., 989, 996, 997, affirmed 174 Fed. 1019; Glass Iron & Steel Co. v. S. Car & G. R. Co., 162 Fed., 542,546.

We have assumed thus far, for the purposes of the argument, that the court should have declined to take jurisdiction of the petition provided the objection had been interposed in the beginning, but we do not wish it to be understood that such is our opinion. The proceeding now in question is a branch of a larger proceeding pending in this court, a proceeding unquestionably of equitable character, a suit in which the creditors and shareholders of an insolvent joint stock

company or partnership had invoked the aid of the court to
33 wind up its affairs and secure an equitable distribution of its assets. A receiver had been appointed who had assumed to collect and administer for the court all the property of the association. One of these defendants was his attorney as such receiver, employed by him, under the sanction of the court, to assist him generally in the capacity of counsel, whether he was to be treated as his attorney in the particular matter here in question or not. The receiver while making sale of the interest of the association in a piece of real estate, through a trustee under a deed of trust, entered into an agreement with this defendant who was his general attorney, and with the other defendant who was and is also an attorney of this court, by which, as the defendants admit, they became joint purchasers with the receiver of the subject of the sale, buying it for less than five hundred dollars, and dividing the profit in equal shares among the three. The receiver afterwards resigned, and, upon an accounting in this case, was found to have misappropriated many thousands of dollars belonging to the estate. In the course of that accounting the facts concerning the matter now in question came to light, and were made known to the court by the report of the new receiver, and the report was treated by the receiver and these defendants as a petition against these defendants, who appeared and consented to a reference. The property thus sold for the receiver and thus bought by the receiver and these defendants was a part of the property being administered by this court, and as it had been dealt with by these defendants with full knowledge of its character as a part of the trust property, is was within the province of the court to require them by proper action in the same proceeding to account for the profits which they had made as constructive trustees. This was the proper place for them to be brought to account, and it was in this case that the accounting should be had. It was just as proper that they should account herein as it was that the receiver himself, with whom they had participated in the wrongful act, should account herein. The same remedies that were available against the trustee were available against those who had made themselves trustees by construction if not strictly ex maleficio with him. Beach in his work on Modern Equity Jurisprudence, at par. 226, has this clear statement of the law applicable to such a situation: "Rightly understood, a constructive trust is only a mode by which courts of equity work out equity and prevent or circumvent fraud and overreaching. There are, therefore, two well defined classes of constructive trusts corresponding with the two classes of fraud, viz:—(1) those which are raised in cases of actual fraud, and (2) those raised in cases of presumed or constructive fraud. Those of the first class are commonly called trust ex maleficio. A constructive trust has not all the attributes of an express trust; its extent and operation are limited to the purpose for which it is created, that is to say, to furnishing an adequate remedy against the fraud. As was aptly said by Lord Westbury in Rolfe v. Gregory: "When it is said that the person who fraudulently receives or possesses himself of trust property is converted by this court into a trustee, the ex-
34 pression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the

parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust. Trusts of this character exist independently of intention. They are raised in respect to all kinds of property, and in all cases where they afford the suitable and efficient remedy."

That in a suit in equity for the administration of an insolvent concern by a receiver, the receiver may so conduct himself as to justify his being made party defendant, and that those who unite with him in the violation of his duty towards the trust estate by converting the same may also be brought in as defendants and required to account in that proceeding, is held in Harrigan v. Kilchrist, 121 Wis., 127, where the whole law of the subject is examined both upon principle and authority, leaving the field so thoroughly gone over that it is only necessary to refer to the nearly one hundred pages, from 207 to 303, in which the subject is dealt with. That case also holds that it is no objection to such action that the funds converted are not to be traced and recovered in specie, and that the relief sought is a money judgment. The following are a few passages culled from that opinion as pertinent to the question before us. "Much has been written on this subject under discussion in recent years, but nothing has been really added to what was decided in Hurlburt v. Marshall, 62 Wis., 590, which followed the decisions in New York under a statutory system similar to ours. The court there said in effect that in a suit of this kind all officers, directors, stockholders, and all other persons who shall have taken and carried away and converted property or funds of the corporation wrongfully are trustees for the corporation and remotely for creditors, and may be compelled in the winding up suit to account therefor as parties defendant. (pp. 238, 239) * * *. It would be a strange doctrine to promulgate, that a trustee, by destroying the trust fund, could thereby terminate his trust in all respects and the cestui que trust have neither a remedy to reach the specific property, nor one to compel the trustee as such to account for the value thereof. (pp. 250) * * * True, the liability of the trustee, when there is no trust property, is personal, and he may be sued at law. True, also, there are authorities to the effect that the right is strictly legal and the remedy legal * * *. But the better rule, it seems, is that the cestui que trust may always sue in equity for an accounting. Perry, Trusts, par. 843. But, in any event, when the liability is germane to a principle cause of action which is equitable, as in this case, it is enforceable as a part of a single subject matter." (p. 252.) See, also pp. 265, 270, 271. As to the right to bring in such intermeddlers with the trust fund by supplemental bill, see p. 274 et seq.

In Bay State Gas Co. v. Rogers, 147 Fed., 557, Circuit Judge Putnam delivered an able opinion holding that where the subject matter of a suit consisted of gains and profits arising out of a trust, either express or constructive, the fact that the amount claimed could be liquidated in cash, so that the purpose of the bill in the end was

merely a demand for money and not the impressing of a lien
35 upon any specific property, did not deprive the federal court of jurisdiction thereof sitting in equity. He said: "The subject matter it is true, is only gains and profits, but it is the gains and profits arising out of a trust, as courts of equity define trusts, express or constructive, and therefore although it sometimes happens that there is a concurrent remedy at law where a trust has worked itself into cash, yet in the federal courts the remedy in equity always remains". p. 559. That case is one in which the same principle of liability was applied against one acting in a trust capacity as the court has already applied in the present case in its former opinion, and may well be added to the citations there made in support of the conclusion reached.

Only one case upon this subject was cited by the defendants—Gaines v. Miller, 111 U. S., 395. That was a bill in equity which was held insufficient on demurrer. The plaintiff sued as the universal devisee and legatee under the will of her father to recover the proceeds of a sale of lands belonging to her father's estate. The sale had been made by the defendants' intestate acting as agent of Rolf and Chew, who at the time of the sale, were themselves acting as executors de son tort of the plaintiff's father's estate. This bill proceeded upon the theory that Rolf and Chew were then executors and ratified their act by selling the lands through said agent, only asking for the proceeds of sale. The court said: "No trust is alleged, no discovery is sought. The appellant has no lien on the property of Hammond's (the agent's) estate, and avers none * * * Having found assets of Hammond's estate * * * and an administrator having been appointed, an action at law was the plain and adequate method for the recovery of the appellant's rights. The circuit court, sitting as a court of equity, had, therefore, no jurisdiction of the case." p. 398. There were two other grounds each of which was held sufficient to sustain the demurrer. But we see nothing in the decision of the first point that is inconsistent with our decision in the present case. In that case there was no trust. In this case there is a trust, and, moreover, this proceeding is a proper adjunct of an equity cause pending before the court.

We have treated the case in all respects as if a regular petition had been filed by the new receiver against these defendants, John Lewis Smith and Edwin L. Wilson, for such we understand to be the effect of what has been done by consent. The facts involved in the claim which the new receiver is seeking to enforce were brought to the attention of the court by the report of the receiver filed December 1st, 1916. On the 8th day of the same month an order was signed which was duly consented to by the said defendants by the signature of their counsel at the foot thereof, in which order it was provided "that this cause, in so far as it involves the differences between the receiver and Messrs. John Lewis Smith and Edwin L. Wilson in the matter of the sale of lot 7 in square 41 of the City of Washington, District of Columbia, to Edwin L. Wilson, be, and it hereby is referred," etc. Then follow appropriate words of reference and au-

thority to decide the questions of fact and of law involved with
26 the reservation of the right of review by the court and of the right of each party to file exceptions to the report.

It remains only to consider the second ground of the motion, viz. the alleged agreement with counsel for the receiver that neither side should file any exception to the report. Without passing upon the question of fact whether such an agreement was entered into, it would seem obvious that counsel representing the receiver, an officer of this court, could not properly enter into such an agreement, especially after the court had insisted that the report should be subject to review. If counsel for defendants relied upon such an agreement made by counsel for the receiver, they relied upon an agreement which they were bound to know was a violation of duty on the part of the opposing counsel, and therefore one on which they had no right to rely.

Moreover, even if the alleged agreement had been one which the counsel for the receiver had a right to make and upon which the counsel for the defendants had a right to rely, the time for the defendants to have called it to the attention of the court, was the time when it was broken by the filing of exceptions. Instead of doing so they chose to submit the case to the court upon the exceptions and to participate in the argument thereof, thereby asking the court to pass upon the question of their liability, in the hope, it must be supposed, of obtaining a favorable decision. When an adverse decision had been announced it was too late for them to fall back upon the agreement, for upon the plainest principles of fair dealing it had been waived by the course they had taken.

The result is that the motion must be overruled and a decree entered in accordance with the original opinion.

WENDELL P. STAFFORD,
Justice.

Decree Sustaining Exceptions to Special Master's Report, etc.

Filed February 1, 1918.

* * * * * * *

This cause coming on to be further heard upon exceptions taken by the Receiver, E. Hilton Jackson, by his attorneys, to the report of A. A. Hoehling, Special Master, herein filed on the 19th day of April, 1917, and the motion of the respondents John Lewis Smith and Edwin L. Wilson to strike from the files and vacate said exceptions and deny any decree based thereon and to dismiss the Receiver's petition, all of which were duly considered by the Court, it is this 1st day of February, A. D., 1918,

Adjudged, ordered and decreed, That said Special Master's conclusion of law be, and the same is hereby overruled and said exceptions be, and they are, hereby sustained; and that said respondent's motion be, and the same is, hereby denied; and it is further

Adjudged, ordered and decreed, That said John Lewis Smith and Edwin L. Wilson are jointly and severally liable for $743.08, with

interest thereon from August 25, 1910, and that said E.
37 Hilton Jackson, Receiver herein, recover of them or either of them the said sum of $743.68, with interest thereon from August 25, 1910, until paid, together with all court costs incident to proceedings had under said reference up to and including the entering of this decree, and that said Receiver have execution therefor as at law; and it is further

Adjudged, ordered and decreed, That said John Lewis Smith and Edwin L. Wilson be, and they are hereby, jointly and severally required to pay to A. A. Hoehling, Special Master, his fee herein of $75.00.

By the Court:

WENDELL P. STAFFORD,
Justice.

Order Allowing Exceptions, etc.

Filed February 1, 1918.

* * * * * * *

The respondents, John Lewis Smith and Edwin L. Wilson, having objected to the passage of the decree, dated this date, upon the following grounds:

1. Because no allowance is to be made to these respondents on account of the recoveries heretofore made by the Receiver as against the claimants in question.

2. These respondents, as they are called upon to reimburse the estate on the theory that they are constructive co-trustees with William E. Ambrose, who has accounted for a proportion of his liability to the estate, should be chargeable only to the extent of the ratable proportion of his liability unsatisfied.

3. These respondents are entitled to their charge of the ratable proportion of the reimbursement of the estate by William E. Ambrose.

4. These respondents should not be charged with the full costs of these proceedings because they only became parties thereto by virtue of an agreement that the matters involved therein were in the nature of an arbitration.

5. These respondents are not shown to have incurred the cost of reporting the arbitration proceedings, or to have been responsible therefor, and are not chargeable therewith, it not being a taxable cost.

6. These respondents are not chargeable with interest because their liability is decreed upon the ground that they are constructive trustees, and they are not open to liability to invest the fund raised by the decree or to invest the same.

7. These respondents are not chargeable with interest beyond the date the receiver elected to claim the benefit of their purchase, to

, the day of the filing of the petition herein against them, and
n only upon the ratable amount of the charge against them as
ve claimed.

8. The theory of the decree ignores the fact that the taxes abated by these respondents were almost equal to the price obtained by them on sale, which taxes would have been pay-
e out of the purchase price if the trustees under the deed of trust
l made the sale these respondents made.

9. These respondents should be chargeable with interest, if at all, y upon the amount by which their sale price exceeded the taxes e and abated by them.

10. The said decree as presented contains no provisions for ex-tions thereto by these respondents.

11. The court is without jurisdiction to pass said decree because submission to equitable cognizance was conditioned, both sides ving agreed not to except to the award of the Master.

12. Because any decree in this case must be based upon equitable nciples and nure to the benefit of the stockholders of the First -operative Building Association, when in fact such decree will not ure because the fund would be exhausted in its application to fees d costs and the expense of ascertaining the distributees, who have ver been, and in all probability at this late date cannot be ascer-ned.

And said objections except No. 5 having been overruled, respond-ts pray the court to allow them an exception to the overruling of e said objections as herein set forth, and exceptions are allowed prayed this 1st day of February, 1918, and an appeal noted in en court to the said decree, with bond, if to operate as a supersedeas, the sum of two thousand dollars, and if, as a bond for costs, in the m of 100 dollars.

WENDELL P. STAFFORD,
Justice.

Memoranda.

February 25, 1918.—Appeal Bond approved and filed.
March 19, 1918.—Time for settling transcript of record and atement of evidence extended to and including the first day of lay, 1918.
May 1, 1918.—Time for settling transcript of record and state-ent of evidence extended to and including the thirteenth day of lay, 1918.
May 11, 1918.—Statement of Evidence submitted.
May 13, 1918.—Statement of Evidence approved, signed and filed

Assignment of Errors.

Filed May 13, 1918.

* * * * * * *

1. The court erred in sustaining the exception to the Special Master's report in holding that the said respondents are not liable for the whole amount claimed by the receiver.

2. The court erred in sustaining the exception to the special Master's report in holding that it was not entirely clear
39 whether the receiver's claim was that the respondents were jointly and severally liable or only severally liable.

3. The court erred in entering a decree in a proceeding for the equitable relief of stockholders of a corporation which decree is in legal effect punitory, in the absence of actual fraud and when it appears from the record that the recovery will not enure to the benefit of the said stockholders who have never been ascertained and cannot now be ascertained for the purposes of distribution.

4. The court erred in granting a recovery to the receiver in the absence of fraud when such recovery will in part or in whole be consumed in allowances for expenses of litigation and not enure to the benefit of the parties for whom the relief is sought.

5. The court erred in not allowing credit in any decree against these respondents for the ratable proportion of the reimbursement by the surety of the former receiver applicable to this part of the total judgment against the former receiver.

6. The court erred in entertaining the exceptions to the report of the Special Master without first inquiring whether equity required the receiver to disregard his stipulation as to the finality of the Master's report.

7. The court erred in deducing its conclusions of law from the rules applicable to the cases of actual fraud when it disclaims any imputation of actual fraud.

8. The court erred in allowing interest for a time before demand and before decree in view of the absence of fraud, in a proceeding for equitable relief.

9. The court erred in reviewing the Master's report on exceptions after estoppels arising out of the receiver's submission to the Special Master's decision as a finality.

10. The court erred in entering a decree against the respondents after the receiver had taken a decree against the former receiver based upon the finding of a Special Master that the former receiver was liable which finding had been confined by the Court.

11. The court erred in overruling the conclusions of law of the Special Master.

12. The court erred in not confirming the report of the Special Master.

LOUIS A. DENT,
Att'y for Respondents.

Designation of Record.

Filed May 13, 1918.

* * * * * * *

The clerk in making up the record will include the following papers:

1. Report of E. Hilton Jackson, filed Jan. 28, 1916—so much thereof on pages 21 and 22 as relates to the claim against Messrs. Smith and Wilson and also item of same #64 on page 15 of the Schedule.

40 2. Page 13 of report of Receiver, filed Dec. 1, 1916, with letter of Messrs. Smith & Wilson attached.

3. So much of order of Court of Dec. 8, 1916, as refers this controversy to A. A. Hoehling as Special Master, being paragraph No. 5 in said order, and also the opening paragraph of said order.

4. Report of A. A. Hoehling, Special Master, filed April 19, 1917.

5. Exceptions to report of Special Master, filed April 28, 1917.

6. First opinion of Mr. Justice Stafford, filed Nov. 2, 1917.

7. Motion, filed Nov. 14, 1917, to strike exceptions, deny decree and dismiss petition, affidavit of James S. Easby-Smith attached thereto and letter of W. W. Millan.

8. Affidavit of Messrs. W. W. Millan and E. Hilton Jackson, filed Nov. 23, 1917.

9. Second opinion of Mr. Justice Stafford, filed Jan. 23, 1918.

10. Decree of Mr. Justice Stafford, passed Feb. 1, 1918.

11. Order of Feb. 1, 1918 allowing exceptions to overruling of objections to decree, which includes the said objections, and appeal noted in open court to the Court of Appeals.

12. Memorandum of Appeal Bond.

13. Memorandum of order extending time to settle statement of evidence to May 1, 1918.

14. Memorandum of order extending time to settle statement of evidence to May 13, 1918.

15. Assignment of Errors.

16. Statement of Evidence.

17. This designation.

LOUIS A. DENT,
Att'y for Respondents.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 68, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 27845 in Equity, wherein Cora Ball, et al. are Complainants and First Co-Operative Building Association of Georgetown, D. C., et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 5th day of June, 1918.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk.

41 In the Supreme Court of the District of Columbia.

Equity. No. 27845.

CORA BALL et al.

vs.

FIRST CO-OPERATIVE BUILDING ASSOCIATION OF GEORGETOWN, D. C., et al.

Statement of Evidence.

By agreement of counsel before the Special Master the entire record in this cause was put in evidence and from said record the following appears:

The bill was filed June 6, 1908, by four stockholders of defendant corporation, for injunction, dissolution and receiver. It alleges that defendant is a joint company or partnership conducting a business called a building association; that the stockholders were unknown to the plaintiffs and the plaintiffs were unable to ascertain the names of other persons who are members of the association.

On June 11, and 19, 1908, four other stockholders intervened, and on July 9, 1908, eight other stockholders intervened and one of the defendant directors answered adopting the intervening petition On the same day the remaining directors and officers answered alleging that some of the books and papers belonging to said association were missing and the late Secretary J. Barton Miller had refused to return the same and they could not give detailed statements of the affairs of the association of which there were about 600 members.

On July 10, 1908, thirteen additional stockholders intervened, making in all 30 plaintiff stockholders.

On July 11, 1908, William E. Ambrose was appointed receiver under bond of $50,000 which bond was duly executed and filed with the American Bonding Co. as surety.

On July 13, 1908, the receiver reported that all of the important records and documents of the association were missing and irretrievably lost and asked authority to employ counsel for the purpose of investigating the records of the Recorder of Deeds to ascertain the debtor stockholders of the association, which authority was granted.

On July 14, 1908, the receiver reported that certain officers and directors of the defendant corporation had delivered to him the property, books and records of the association; that upon examination thereof he discovered that the most essential books, records and papers were not in the office of said association; that he was informed the defendant Secretary of said association, J. Barton Miller, had removed the same; that demands had been made upon Miller and his counsel for the same without result; and praying for a contempt rule, under the order of appointmnet of the receiver directing the delivery of such records, which rule was granted the same day, and was continued from time to time.

42 On July 30, 1908, Miller answered the rule, setting up that he had been arrested for taking away and concealing the said records; that they were not in his possession or under his control; that any further answer would tend to incriminate him and therefore declining further to answer; and the rule was continued.

From time to time during the ensuing year the receiver reported sales of real estate and collections of loans from debtor stockholders which were approved, and also the necessity of procuring foreclosures on certain loans by the trustees under the deeds of trust securing the same.

The first report of the receiver of his acts in extenso was filed July 23, 1909. Among other things, he reported that among the missing records of the association were the stock books and books containing records of individual payments made by stockholders; that the only record of value recovered by him was a cash book covering about four years previous to the filing of the suit; that persistent endeavor had been made by him without avail to discover the records of the association; that in order to learn who were the stockholders he had published an advertisement in the Star, quoted in the report, requesting all stockholders to call and submit their pass books to him, as a result of which many delivered their books while others stated they had been induced by said Miller to leave their books with him; that according to the last annual report of the association, made a few days before the filing of the bill in this cause, there were 430 investing and 172 borrowing stockholders; and he annexed to his report as a result of his efforts a stockholders' list showing but 328 investing and 113 borrowing stockholders.

The receiver continued up to 1911 to report various collections on loans, foreclosures and sales.

On February 16, 1912, the receiver, on his petition, was authorized to defend the suit of S. Thomas Brown, one of the officers of the corporation, Equity No. 30,340, based on the claim for reimbursement on a note of some $27,000 which the said Brown negotiated for the association as an accommodation party and had been compelled to pay.

On May 26, 1914, George Freeman, and other officers of the corporation, filed a petition in the cause against the receiver, setting up a claim on a note of $10,000 on which they were accommodation parties for the benefit of the association under circumstances similar to the Brown note, and answers were filed by the receiver and the executors of Brown raising issues which were subsequently, though on a different state of pleadings, determined in the cause on the report of the Special Master by the payment of said two Brown and Freeman claims as hereinafter shown.

On June 6, 1914, the receiver filed his report in compliance with the 73rd rule showing the net balance for which accountable of $33,889.39, accompanying the same with a detailed report of receipts and disbursements; and on the 26th of the same month the account of the receiver was referred to the Auditor to state the same and the distribution of funds with directions in such distribution to prefer

the claim of the executors of Brown on the note above referred
43 to as established by the decree in equity No. 30,340 with right

to the said petitioners, Freeman and others, to establish before the Auditor by testimony their claim to their pro rata with the said Brown decree.

On November 20, 1914, the receiver was authorized to pay $15,000 on account of the said Brown decree pending the further determination of the matter.

Proceedings were had before the Auditor under this reference during the remainder of the year 1914 and in the spring of 1915 and the Auditor, having discovered irregularities in the account, examined the receiver himself with respect to his accounts.

Mr. Jas. S. Easby-Smith, of counsel for the receiver, testifying before the Auditor at pages 108-10-21 of the record stated as follows: In this case Mr. Wm. E. Ambrose was appointed receiver on July 11, 1908, and a day or two later obtained leave of court to employ counsel and immediately invited Mr. Jno. Lewis Smith and myself to be his counsel. The first thing which we did was to endeavor to find and get into the possession of the receiver the books and accounts of the building association. * * * We were informed by the directors that all the current books of any value seemed to be missing and after a thorough examination of the safe and of the office we were unable to find any evidences of property. The next morning we prepared a petition and secured a rule against Miller and on the same day obtained from the police court a search warrant and accompanied by the receiver and a deputy U. S. Marshal and a police officer, Mr. Jno. Lewis Smith and I went to the house of Mr. Miller where an exhaustive search was made without results * * * In the meantime on July 16, 1908, we prepared and filed an equity suit, Ambrose v. Miller, No. 27,931, seeking an account

ing and discovery. * * * Our search for the missing books and assets continued (up to March, 1910), and we exhausted every resource to discover the same. We advertised, offered rewards, and the receiver also employed detectives to go to places in Virginia where it was known Mr. Miller had been, it being hoped that he had taken the books there and that they would be discovered, but no trace of them could ever be found. Knowing from the reports to the association that practically all the assets consisted of loans made on real estate and finding no trace or evidence of these loans among the books and papers of the association we decided that the only means of ascertaining — what the assets of the association consisted would be an examination of the land records of the District of Columbia. * * * There were no stock ledgers, in fact no ledgers, no accounts with borrowers and absolutely nothing in the records of the association from which we could get any information as to who were indebted to it.

On May 25, 1915, the receiver tendered his resignation.

On June 23, 1915, Gibbons, administrator, one of the former petitioners with Freeman on the $10,000 note, filed a new petition setting up the irregularities which had developed before the Auditor, the resignation of the receiver, the desire of the petitioner
44 and other creditors to proceed against the surety on the receiver's bond and the advantage of continuing the cause before the Auditor, who was about to leave office, as a Special Master, and on this petition an order was entered transferring the cause from the Auditor as such to him as Special Master, and at the same time an order (June 28, 1915), was entered accepting the resignation of the receiver without prejudice and appointing the present receiver.

On July 8, 1915, the former receiver was directed to turn over to the substituted receiver the balance on hand to his credit in bank amounting to $19,348.80.

On December 6, 1915, the Special Master's report was filed finding in favor of the claim of Freeman, Gibbons and others on the $10,000 note subject to the priority of the Brown note surcharging the former receiver with the additional sum of $17,911.63 principal and showing a balance due by him, including interest, after crediting the amount turned over to the present receiver, $31,914.26. At the conclusion of the Special Master's report he finds as follows: "No distribution is stated at this time. If restitution is made by the surety on the former receiver's bond sufficient to cover the defalcation, even exclusive of interest, there will be sufficient to provide for all expenses of the receivership and payment of the claims on the two notes in controversy according to the findings of this report if ratified by the court. If thereafter there should be a surplus no distribution could in any event be stated without proof of the stockholdings as to which there is now no evidence in the case."

In Schedule A of surcharges against the former receiver is the entry under date of August 25, 1910, of the transaction in question on appeal, that is, "Schwab, sale and resale not reported, $795.94", explained in schedule B as being the net proceeds of resale $1400;

less taxes, $4.06; broker's commission, $50.00, and tax sale redemption, $550.00.

With respect to this transaction, Messrs. Smith and Wilson, the respondents herein, summoned by the Receiver, testified before Special Master Dent as follows:

EDWARD L. WILSON, a witness called on behalf of the receiver, having been first duly sworn, testified as follows:

By Mr. Jackson:

Q. Do you recall that on June 28th, 1910 you purchased through Mr. Weschler, Auctioneer, Lot 7 in Square 41 on 24th Street, N. W., between H and I?

A. Yes, sir.

Q. Sale conducted by R. A. Casilear, Trustee for the First Co-operative Building Association?

A. Yes, sir.

Q. At — price did you bid that in?

A. I have forgotten, but it was around $700 or $800, is my recollection. It has been four, five or six years ago.

Q. Do you recall that you purchased it at six and one-half cents a square foot?

A. No, I do not; but my recollection about the sale is this,
45 that they had a sale and I bid it in and that sale for some reason was set aside and it was re-sold and I was the highest bidder at the second sale, and I think my second bid was more than my first bid.

Q. Did you make a payment to Weschler, a cash deposit?

A. No, I do not think so. I think the trustee said he knew me and was willing to fix it up.

Q. What did you do with the property? Did you make any payment on it?

A. I do not think so. Just after the sale somebody came to me—now I have forgotten who it was—and said that Harry A. Kite he thought would buy that property, and asked me for a price on it. The Title Company, I think was then running the title and it was reported to me for the completion of my sale, and we had some dickering for a day or two and finally Kite came to an agreement with me as to what I would take for my purchase and he agreed to give me that much money, as much as I wanted and was willing to sell for.

Q. What did he give you?

The Master: He probably does not want to tell you that.

A. I have really forgotten. I would not have any objection, but I have forgotten.

The Master: Mr. Kite bought your purchase?

A. He bought my purchase and I turned the whole matter over to the Title Company and it was settled through the Title Company and they paid Ambrose or the Trustee my bid and the balance that came to me.

By Mr. Jackson:

Q. Who paid Ambrose?

A. The Title Company. Kite, I think, turned the money in to the Title Company to settle the deal, and the difference came to me.

Q. I think you are in error. The Title Company reported the abstract of the title, but made no settlements.

A. That is my recollection.

Q. Is Mr. Kite here, or Mr. Hill, who was associated with him in that transaction?

A. I do not know.

The Master: I suppose you could tell what your purchase price was if it became necessary?

A. I do not know. The Title Company may have given me a settlement sheet and I may have it put away in the safe. The substance of the whole thing was I bought it at public sale and Kite offered me an advance and I made a profit on it and sold it.

(Witness excused).

E. L. WILSON, a witness called by the receiver, having been duly sworn, upon examination testified as follows:

46 By Mr. Jackson:

Q. Mr. Wilson, you have been examined with respect to the sale of Lot 7 in Square 41, representing property on 24th Street, between H and I, Northwest, sold by Weschler, the auctioneer, on June 28, 1910, to yourself for the account of R. A. Casilear, Trustee of this Association. That is correct, is it not?

A. Yes, sir.

Q. Will you take this check, which is marked: "Marsh No. 4", look at it, and state whether or not that amount of money came into your hands through the Real Estate Title Insurance Company, by way of profit on this transaction?

A. Yes, sir, the check did come into my possession. I see Mr. Ambrose's endorsement on that.

Q. Before we get to that, this represented your profit on this transaction, did it not?

A. Yes, sir.

Q. And there was a further sum of forty odd dollars that came to you by way of additional profit, by way of refund on certain taxes also, was there not?

A. Yes, sir. It might be well to let me explain that additional sum.

Q. Yes, sir, go ahead.

A. The taxes, as I recollect the matter, were double or nearly double the amount of the purchase price, and Ambrose was trying to get some adjustment of that with Wiltsie, who held the tax title, because the taxes were more than the sale price of the property.

Mr. Sullivan: You mean the taxes, including what Wiltsie claimed to release his trust deeds?

The Witness: Yes, and he could not give me a clear title, because the property was supposed to be sold to clear taxes, and after some negotiations I think Ambrose came to me and said that in the meantime he had arranged this sale to Kite, I think it was through Alan Walker—I am not sure about that, though—had gotten the sale to Kite, and there was good profit in it, and they did not want to lose it, and I agreed with Ambrose to pay the difference out of the purchase price for the taxes, and it was afterwards discovered that there was a rebate or refund due us, because the current taxes were included in that $550.

By Mr. Jackson:

Q. What part of that was a rebate or refund?

A. It was forty some dollars. I think the title company certificate will show that, because that amount was paid to the Collector of Taxes.

By the Master:

Q. Then, as a matter of fact, you actually paid more than the price you bid for the property?

A. Yes.

Q. Because you allowed the taxes to be taken out of the purchase price, which were, as a matter of fact, in excess of the amount which you had bid for the property?

A. Yes. We did not want to lose that deal to Kite. That is the reason.

47 Mr. Sullivan: You also mean you actually bought the property for less than the taxes that had accumulated?

The Witness: I did not know what the taxes were on it.

Mr. Sullivan: But you bought it for less than the taxes that had accumulated on it?

The Witness: Yes, that developed. I did not know anything about the property.

By Mr. Jackson:

Q. Mr. Wilson, do you now recall what you bid this property in for?

A. Six and a half cents a foot.

Q. Did you figure it as to what it amount- to?

A. I think it amounted to $491.

Q. Did you put up any deposit on that occasion?

A. No, Ambrose told the trustee that he knew me and that a deposit was unnecessary at that time; he knew I was good for it. I was ready, though, to give a deposit.

Q. But Ambrose did not require it.

A. No.

Q. But expressly waived it, as you say?

A. Yes, he waived it.

Q. I hand you again what is known here as "Marsh No. 4", and ask you what you did with the check as soon as you got it.

A. I have not any independent recollection of it, except, as it appears on the check, the check came to my possession, and seeing Ambrose's endorsements under it would indicate that in some way I turned it over to Smith.

Q. Does that refresh your recollection as to what became of the proceeds of that check.

A. Well, I do not need that to refresh my recollection. I can tell you that very plainly. I got one-third of it.

Q. Who got the balance?

A. Smith got one-third and Ambrose got one-third.

Q. Your present statement refers to the check. What became of the forty odd dollars, refund of taxes you have already testified to?

A. That was part of the profit. That was divided also.

Q. In the same way?

A. In the same way.

Q. One-third to you, one-third to Ambrose, and one-third to Smith?

A. Yes.

Mr. Whitford: Which Smith is that?

The Witness: John Lewis Smith.

Mr. Jackson: That is all I care to ask the witness.

Cross-examination:

By Mr. Sullivan:

Q. Mr Wilson, can you explain to us how it happened that Mr. Smith and Mr. Ambrose each got one-third of that?

A. I went there to bid on this property. The property was offered once. I went there and bid the first time, and that time there wasn't any understanding that we would buy this property, between Ambrose, Smith and myself. I went there as a bidder, as anybody else, at the first sale.

The Master: You mean to buy for yourself?

The Witness: To buy for myself, and I bid on the property. I was one of the bidders on that property, and in fact was the successful bidder, and it was about to be knocked down to me at $250, and they had some conference there, and of course I do not know what the conference was, because I was not a party to it.

The Master: Who were the parties to it?

The Witness: I do not know—the trustees and auctioneer, and I was a regular bidder there, as anybody else, and there were other bidders there. It was announced that the property would be withdrawn. So it was put up again for sale, and I bid at the second sale. Some time after the first sale, which is my recollection of it, Smith or Ambrose suggested that we go into the thing jointly, and I said: "Well, I haven't any objection to it. I do not care. The property is cheap at the figure." So we went out there and I bid on it again, and I got it at six and a half cents, which was an advance over the other bid, and the property was knocked down to me.

By Mr. Jackson:

Q. This arrangement was had prior to the second sale?
A. That arrangement was had prior to the second sale. That is my recollection.
Q. That was the sale at which you bought?
A. That was the sale at which I bought.

By Mr. Sullivan:

Q. At that time what was the relation of Mr. Ambrose to the matter?
A. I don't know. I did not investigate his relation.
Q. He was the receiver for the association?
A. I presume so. I did not go into those things.
Q. What was the relation of Mr. John Lewis Smith to the matter?
A. I do not know. I do not know that I knew at that time. I knew afterwards he was attorney for Ambrose, as receiver of the association.
Q. You said that you thought Mr. Alan Walker brought Mr. Kite's attention to this matter. How clear is your recollection about that?
A. Here is what I recall about that. The next day or two after that, John Lewis Smith told me that he went to one or two real estate men about the property, and I think I possibly went to several, and tried to sell the property.

The Master: After the second sale, after you bought?
The Witness: After I bought, while this matter was pending about the disposition of the taxes, and I got word that this man Kite was going to make an offer on the property, and he did make an offer, and the same finally went through.

By Mr. Sullivan:

Q. From whom did you get that.
A. I do not remember now.
Q. Can you recall whether Mr. Ambrose or Mr. John Lewis
49 Smith?
A. I think it was through John Lewis Smith, not through Ambrose, because I think Smith called up Alan Walker, and Alan Walker made some statement that the best thing to do with the property would be to sell it to a builder, as it was such a property as a builder would take, and Kite being one of the builders, he finally bought the property.
Q. How many other bidders for this property were present at the second sale?
A. There were, I think, two. I think it narrowed down to two of us. There was a large man there, I think he was an Irishman.
Q. You do not recall his name?
A. No. They tried to prevail on him to keep on bidding. There was fair bidding at the second sale; you might say good bidding, but it narrowed itself down to two men, this other man and myself.

Q. Do you remember how many bids were made?
A. I do not remember about that.
Q. Do you remember at what price the property started?
A. I do not remember that, but it was such bidding as you see at an ordinary auction sale.
Q. Do you remember what the increase of the price at the second sale was over the price at the first sale?
A. About $141.
Q. How long after the second sale was it before you sold to Kite?
A. Well, the negotiations started—the record will show that. I have forgotten. It has been a long time. The records will show that, but some negotiations were had about it, as I recall, and there were some negotiations with Wiltsie about getting these taxes fixed up, and my recollection about that is that Ambrose did that.
Q. Did what?
A. Had negotiations with Wiltsie.
Q. I am speaking about the negotiations with Kite.
A. I do not remember how long they lasted, or just exactly when they commenced, but it was probably ten days or so after.
Q. What period of time?
A. After the sale.
Q. At the end of that short period of time you sold for eighteen cents a foot property you had paid six and a half cents a foot for, the receiver and attorney for the receiver being interested in the purchase and sale?
A. Yes, sir.

By Mr. Jackson:

Q. Mr. Wilson, I neglected to ask you one question. You have testified that prior to this second sale some arrangement was had between you and Mr. Ambrose, the receiver, and Mr. Smith, with reference to the division of profits on that sale. That is correct, is it not?
A. Yes, sir.
Q. At whose instance?
A. Well, I would not put it that way, because at that time we did not know there were going to be any profits.

The Master: He said they suggested to him that the three of them go in on the purchase.
Mr. Jackson: To make what was in it?
The Witness: If there was any profit.

Q. Now, at whose instance did you appear there and bid on this property when it was put up and withdrawn?
A. I went there solely on my own behalf.
Q. At anybody's suggestion that there was going to be a sale there?
A. I do not remember about that, possibly so. I would not state definitely about that.
Q. As a matter of fact, did not Mr. Smith tell you?
A. Possibly so.
Q. Well, is it not true that, as a matter of fact, he told you to go there and bid?

A. Yes, possibly so, because I bid at other sale. I appeared at other real estate sales and bid on property, or with the idea of bidding on property.

Q. As a matter of fact, did not Mr. Smith tell you he could not bid on that property, and suggested that you go there and buy it in or bid on it?

A. I do not recall that he made that statement.

By Mr. Sullivan:

Q. Did you have a conversation with me on the morning of Friday, September 3, 1915, about ten o'clock, in front of the Whitford Building?

A. Yes, sir.

Q. Did you on that occasion tell me that your attention was originally called to this property by Mr. John Lewis Smith, who told you that the property was to be sold, and that he, Mr. John Lewis Smith, could not bid on it; that he was attorney for the receiver; and that you thereupon went to the sale and bid?

A. No, sir, I did not tell you that that was my recollection of that conversation. My recollection was that Smith told me about the property, but I did not tell you that Smith said he could not bid. I never told you that.

By Mr. Jackson:

Q. It is correct, then, Mr. Wilson, to the extent of indicating that your attention was first called to this property prior to the first time it was offered for sale, by Mr. John Lewis Smith?

A. Yes, sir. I say I cannot testify any more about that than I have. I have some general recollection about it, but I would not say definitely, but I think so.

By Mr. Sullivan:

Q. Did you not tell me on the same occasion that Mr. John Lewis Smith and you had been interested in deals before that, citing the Western High School as one?

A. I probably said we had been interested in real estate matters together. We have.

Q. Was not the substance of the impression just indicated to convey that you and Mr. John Lewis Smith had been interested in deals together before, and that the probability of this situation was that you and Mr. John Lewis Smith were interested in this deal?

A. Together? No, sir, because our conversation was principally about Ambrose.

Q. I say was that the impression you intended to convey,
51 because that was the impression you did convey, and I wanted to give you the opportunity to clear away the impression.

A. I think our conversation dealt principally with Ambrose.

Q. Yes, sir, it did principally with him, but this matter also at the same time, if I remember correctly I have my notes on it.

A. I do not remember Mr. Smith, because I think Smith's name was hardly mentioned in the conversation.

(Witness excused.)

JOHN LEWIS SMITH, recalled as a witness on behalf of the receiver, having been previously sworn, upon examination testified as follows:

By Mr. Jackson:

Q. Mr. Smith, Mr. E. L. Wilson has testified with respect to the purchase of Lot 7, Square 41, on 24th Street, Northwest, between H and I, on June 28, 1910, at a sale conducted by Weschler, the auctioneer, for R. A. Casilear, trustee of the First Cooperative Building Association of Georgetown. Did you have anything to do with respect to that purchase or sale of the property by Wilson after he purchased it?

A. Yes. My recollection is that the property was offered prior to that time, and that Wilson was a bidder at that first sale. After that I think that I suggested to Wilson that I would become interested in it if he would purchase at this sale later on. I believe it was readvertised, and Wilson did bid the property in. I do not know the dates of the sales, but I assume that the sale was the second one you referred to.

Q. At what time, Mr. Smith, did you make that suggestion to Mr. Wilson with respect to these two sales?

A. My impression is that it was on the return trip from the first sale. Whether it was or not I won't be positive.

Q. Do you recall what was the occasion of Mr. Wilson bidding at the time of the first sale, when the property was withdrawn?

A. Why, I suppose Mr. Wilson bid simply on speculation.

Q. I mean what was the source of his information that there was going to be a sale at that time? Do you recollect anything about it?

A. The sale was advertised, and it was a time when there had been a number of building association sales, I think.

Q. You think that was the only means you had of knowing there was to be a sale?

A. The only means I can recollect at this time. I may have mentioned it to him, or I may not.

Q. Do you know what was done with the property after it was bought in on the occasion of the second sale?

A. Yes. I called up Alan E. Walker and asked him to look up the lot, and talked to him about it, and I think I talked to Moore & Hill about it.

Q. Who bought it, as a matter of fact, do you recall, from Wilson?

A. I think Walker—I know Walker negotiated the sale, and I think to Harry Kite. The property, as I recollect it, was a
52 very deep lot, with a frontage of forty or fifty feet, but I think that—in fact, I am almost sure that Harry Kite bought it through Alan E. Walker.

Q. Do you remember the profit that was made on it?

A. I do not remember definitely, six or seven hundred dollars, I think.

Q. Do you remember what was done with the profit?

A. The profit was divided among us three purchasers.

Q. Who are the purchasers that you refer to?

A. I think Ambrose had a third interest, I had a third, and Wilson had a third.

Q. I hand you a check marked "Marsh No. 4," and ask you if you recall what relation that check has to the profit we are now discussing, if any.

A. That is a check for the difference in the price paid and the amount sold for. That is my signature on the back of it.

Q. What was done with that check?

A. Evidently deposited in my account at the Commercial National Bank.

Q. What was done with the proceeds?

A. Divided among the three.

Q. Did you divide it?

A. I thing I divided it, although I am not positive of that.

Q. But you are certain it was divided?

A. I take it that it was divided by me, because my endorsement appears there, and it was probably deposited in my account and checks drawn for it for the amounts, although I have not seen the checks.

Q. Do you also recall that there was a refund of taxes coming to Wilson on account of this transaction, of something in excess of $40?

A. I haven't any independent recollection of it, but I understand that there was.

Q. Do you know what was done with that?

A. That was divided.

Q. In the same way?

A. Yes, sir.

Q. Mr. Smith, at the time of this auction sale, both the first time it was put up and withdrawn, and the second time, you were one of the attorneys for Ambrose, receiver in this matter, were you not?

A. Yes, sir, I was.

Q. You also were one of the attorneys at the time of the division of this profit on this transaction?

A. Yes, sir.

Mr. Jackson: That is all I care to ask Mr. Smith about it.

The Witness: I may state that at the time of the sale Mr. Ambrose, as receiver, was interested in the difference in the purchase price, over and above whatever trust may have been held by Casilear, for the sale, as I recollect, it was made by trustees under a deed of trust.

By Mr. Jackson:

Q. Yes, made through R. A. Casilear, trustee for the account of the association?

A. In the matter of receiver's sales.

Q. For the account of the association, and under the direction of Mr. Ambrose, receiver. I believe Mr. Easby-Smith was your associate counsel for Mr. Ambrose at this time?

A. Yes, sir.

53 Cross-examination.

By Mr. Sullivan:

Q. Mr. Smith, there is just one question I want to ask you, and I will preface the question with the statement that the purpose of asking this question is to enable you to testify, if you are prepared to do so, as Mr. Wilson has done. I will also preface the question with this statement, that on the morning of Friday, September 3, 1915, about 10:30 o'clock, in a discussion of this sale between Mr. E. L. Wilson and myself, he stated that prior to the first sale his attention was called to it by you; that you told him that the property must be sold; that you remarked to Mr. Wilson that as you were attorney for the receiver you could not bid upon it, and you suggested that Mr. Wilson do so, and that he went to the sale and bid. This morning Mr. Wilson's recollection differs from mine in respect to this interview. He said that he had no recollection of your having said on that occasion that you could not bid upon it, as you were attorney for the receiver, but that his recollection was that you had called his attention to the sale.

The Master: That is not quite what he said. He would not testify positively that Mr. Smith had called his attention to the sale, but said he thought he had.

Mr. Sullivan: He had a general recollection to that effect.

The Master: Yes, he thought he had.

Q. Now, the interview created the impression in my mind, as the further statement was made at that time that you and he were interested in a number of other transactions, that the purpose of this suggestion was to create an interest at the time of the first sale between you in bidding on this property. State your recollection of the facts in that connection?

A. I, as I testified before, have no doubt that Wilson and I discussed the fact that these sales were going on, but there was no arrangement to purchase that property for the three until after the first sale. I remember distinctly talking to Adam Weschler about the property at the time of the first sale. There could not have been any objection such as stated in your interview with Wilson, because the fact is that I did bid on the Hines property in Tennallytown, and my recollection is that I bid publicly at auction on another sale. I did not consider that my duties as attorney for Mr. Ambrose had anything to do with these sales, but my recollection is, as I stated formerly, that it was after the first sale that I mentioned going in with him on that deal, but there was no purpose of concealment about it, because, as I say, I bid openly at at least one other sale.

The testimony of these witnesses as re-taken on call of the Receiver before Special Master Hoehling is as follows:

JOHN LEWIS SMITH, a witness called on behalf of John Lewis Smith, Edwin L. Wilson and Wm. E. Ambrose, defendants in the petition of E. Hilton Jackson, receiver, having been first duly sworn, was examined and testified as follows:

54 Mr. Smith: I would like not to make any corrections in my former statement, but to enlarge on that statement to the extent of meeting certain erroneous conclusions which have been placed on this transaction, and which are not justified by the record. For that reason I would like to take the matter up from the beginning, briefly.

I was attorney for the receiver of the First Cooperative Building Association. As such attorney I had nothing to do with any sales of real estate by trustees under deeds of trust, either of this property or of any other property. The receiver as such to my knowledge had no connection with the sales other than as the representative of the parties securing them. I attended a great many of the sales, and I told probably twenty different people of the sales and suggested that they attend. I think that I told Mr. Edwin L. Wilson, and I know I told Mr. Allan Walker that these sales were going on and suggested that he attend the sales.

The sale in question was originally advertised by the trustees, who I think were Raphael A. Casilear, a real estate man of Georgetown, and probably Mr. McIntyre, who was a grocery man in the first ward near this property. The sale was advertised by the trustees in the usual course of trustees' sales, and at the first sale there were present probably fifteen or twenty people. Mr. Edwin L. Wilson was the highest bidder. After some conference between Mr. Casilear and Mr. Weschler and not, as was said here the other day, with Mr. Ambrose, the property was withdrawn on the ground that the price was inadequate.

After that sale Mr. Weschler, Mr. Wilson, and I think one or two other lawyers, and I discussed the value of that property, and my recollection is that Mr. Weschler said that any property in the City of Washington which sold for ten cents a foot or under was cheap property.

The property was again advertised for sale. In the meantime, I had told Mr. Wilson that if he wanted to bid on the property I would be willing to take an interest in the purchase if he were the highest bidder. At the next sale there were probably about the same number of people, the property having been readvertised in The Star. At that sale Mr. Wilson bid and the property was knocked down to him. There were other bidders, how many I do not know. I know of one who kept a store across the street. The property was knocked down to Mr. Wilson, and on the following day I called Mr. Walker up. I called one or two other real estate men, and I asked them to see if they could get a purchaser for the property. Mr. Wilson tendered his check at the sale and there was some conversation about it with the trustee. Whether it was given or not, I did not know until this hearing. Mr. Walker said he had looked the property up on the plat book, and I dropped in to see him that day, the day after the sale. We went over the dimensions of the property; it was a

very deep lot, I think about fifty feet front. Mr. Walker suggested that it would be a good property for a builder, and I remembered at the time asking him why the builders did not attend these auction sales. He then suggested that he had two clients who were builders, one of them was in his building, Mr. Harry A. Kite.

I asked him what he thought the property was worth, and we had a general discussion, the details of which I, of course, cannot give at this time. After that Mr. Walker notified me that he had an offer for the property. After a conference with Mr. Wilson the offer was accepted and this contract signed.

Another construction has been put on the failure to complete the terms of sale. We were prepared at any time, from the time that property was offered for sale, to comply with the terms in accordance with the advertisements. It developed that the trustee could not make title because of the outstanding tax titles that Mr. Wiltsie had. With those negotiations I am not familiar in detail, but I do know that the delay in consum-ating this sale was because of the trustee and not because of any connection that we might have had with it. We were prepared from the day the offer was made up to the time the deed was actually delivered to take the property on the terms on which we had bid on it.

I may say further that so far as there being any concealment about it, I bid on two or three pieces of property myself. I was never the high bidder on any of them, and I considered that I had a perfect right to bid on any property sold by a trustee in the way that property was sold. Now, I may have been wrong about that, but there were certainly no collusion or concealment on the part of anybody in connection with this transaction. The delay and the failure to comply with the terms of the advertisement were not due to anything caused by Mr. Wilson or by me in this connection. I put the property in Mr. Walker's hands for sale and he secured the purchaser of it.

By Mr. Easby-Smith:

Q. Have you any recollection as to whether or not you named any price to Mr. Walker when you put the property in his hands for sale?

A. My recollection is that I asked his advice about it, because I was not familiar with the value of property in that section, and I represent Mr. Walker and we are intimate friends, and I think I asked his advice as to what the property ought to be worth?

Q. You mentioned in your statement Mr. Casilear and Mr. McIntyre as having been the trustees under the deed of trust securing the building association. Do you recall whether or not at that time Mr. McIntyre was living or whether Mr. Casilear sold as surviving trustee?

A. I do not recall that. I know that Mr. Casilear was there, but my recollection is that while these sales were in progress Mr. McIntyre went to Europe.

Mr. Millan: It is shown by the record in this case that Mr. Casilear made this sale as surviving trustee, and Mr. Wilson, who was then dead, was the other trustee.

The Witness: There were three trustees of the Building Association, McIntyre, Wilson and Casilear.

56 Cross-examination.

By Mr. Millan:

Q. Mr. Smith, I assume that you have read your former depositions?

A. I have read them since that time.

Q. And since these hearings began?

A. Yes.

Q. I understand you to say that you did not desire to qualify the facts as you had given them there, but simply to make a fuller statement to answer certain inferences that you thought had been drawn from your testimony?

A. Certain inferences that were drawn in letters written by you and Mr. Turner.

Q. So you stand on your depositions as you gave them?

A. I stand on my depositions as I gave them.

Q. And your recollection regarding the transaction was quite as clear then as it is now?

A. No; my recollection is probably clearer now because of the fact that this matter has been up since then a number of times, and it has probably been refreshed by various things. My present statement is much more complete than the statement in that deposition, but, as I recollect the deposition, I do not care to contradict any word in it.

Q. At whose request did you interview Mr. Walker some few days, I believe you say, after this auction sale?

A. At no one's request. I was interested in the property and I interviewed him one day after the sale, I stated.

Q. So that the statements of Mr. Wilson and yourself in your former depositions that you had made some arrangement for being jointly interested in this property, after the first auction sale and before the second, are correct?

A. They are correct. I so stated just now.

Q. Do you remember the fact that the high bid at the first sale was $350?

A. I do not remember the figures, but my recollection is that the bid at the second sale was an advance on the first sale.

Q. Do you recollect that the high bid at the second sale, the bid under which it was undertaken to knock the property down to Mr. Wilson, was $491?

A. At the second sale?

Q. Yes.

A. I presume those figures are correct. I have not the figures in my mind.

Q. They are shown by the record here.

A. I do not question them.

Q. The day after that you placed the property with Mr. Walker, but you do not recollect whether you gave him a price or not?

A. I should say that I did not give him a price; that I asked his advice upon it.

Q. But upon the basis of his advice, do you know whether you and he agreed about that interview upon what should be the asking price?

A. I have no recollection of agreeing on any asking price.

Q. As a matter of fact, within a week from that time, that is to say eight days after the auction sale, he did bring you this contract for $1400?

A. I have no doubt that that is correct.

57 Q. The contract appears to be dated the 6th of July and the auction sale, as shown by the record, took place on the 28th of June?

A. Was a note made of that date of contract?

Q. Yes; the 6th day of July.

A. That is correct, then.

Q. Do you recall that it was found after the auction sale that the amount that had been bid by Mr. Wilson was not sufficient to clear up the tax claims against the property?

A. I remember Mr. Wilson telling me that there was difficulty about the tax matter, but I had nothing to do with that transaction.

Q. As a matter of fact, it took more money than he had bid to clear up the tax claims?

A. So the record shows.

Q. Do you recollect at whose instance this period of fifty days was allowed for the closing of the contract of sale?

A. I heard you ask that question of Mr. Walker; so that I know that it was not at my suggestion, and I presume in these building contracts that it was probably at the suggestion of the operator in that class of property, but I have no knowledge or recollection.

Q. Was it done because it was known that there was trouble on account of taxes?

A. It was not done because of any suggestion on my part because of taxes or anything else. I should say from the general course of business in a real estate office that that contract was prepared, signed by Kite, and then presented to the owner, and I presume that that was Mr. Kite's suggestion, but I have no knowledge of it at all. My recollection is that it was not concluded, though, within fifty days. But the record will show that.

Q. You know, Mr. Smith, that this property was being sold at the instance of Mr. Ambrose, the receiver?

A. It was being sold at the instance of the parties securing it.

Q. And that was Mr. Ambrose?

A. Mr. Ambrose represented the Building Association as receiver.

Q. And you were his attorney at that time?

A. Yes, sir.

Mr. Millan: I think I ought to say for the sake of Mr. Smith and of ourselves that we disclaim having drawn or attempted to draw any inferences from this transaction or the testimony other than what the testimony itself shows. We say now, as we have previously stated, that we stand for the facts of this transaction on the testimony of these gentlemen themselves, as to the truth of which we have no doubt and never had.

By the Master:

Q. Mr. Smith, at what particular time did Mr. Ambrose become the party interested?

Q. Mr. Smith, at what particular time did Mr. Ambrose become the that I did.

Q. And that was between the first and second sales?

A. That was between the first and second sales, and I say this although I have never been able to positively fix the place or time. My recollection is that as we left the first sale there were probably five or six people together; that we discussed the price of property in that neighborhood with the auctioneer, and at that time I said, "I will take an interest in it if you buy it."

Mr. Easby-Smith: To whom?

58 The Witness: To Mr. Wilson, and I think Mr. Ambrose probably made the same statement at that time, but that is the only recollection that I have of any understanding, and I think that occurred the afternoon of the first sale on the way back.

By the Master:

Q. Do you mean that is the only recollection you have as to any understanding so far as admitting that Ambrose was concerned in the enterprise:

A. Yes; my recollection is that after I said, "I will take an interest in it," he said, "Well, I will go into it too" in practically the same way that I had said. That, I think, is the way the arrangement was entered into.

Q. From anything that was said in that connection, did you understand that it was contemplated that Ambrose should contribute an equal one-third in the event that the property was knocked down to Mr. Wilson at the second sale?

A. Ambrose was to contribute a third, I was to contribute a third, and we were to stand profit and loss on that basis, and when the check was turned over to Mr. Wilson he turned it over to me, and I drew their checks on the Commercial National Bank for the one-third each and the profits.

Q. Mr. Smith I omitted to ask you one question on a subject that I would like cleared up, and that is whether or not at the second deed of trust sale Mr. Ambrose, while the sale was going on and until and including the knocking down of the property to Mr. Wilson, was in communication with the trustee and auctioneer, either or both?

A. I should say, although I have no independent recollection of

Mr. Ambrose's movements on that day, that he was, just as with all of us, in the vicinity of the auctioneer when the property was knocked down, but so far as giving any directions to either the trustee or auctioneer as regards the knocking down of the property, I should say that he did not. I say that because it would have made an impression on my mind if he had, knowing the situation as it then existed.

Q. And as far as you have any recollection on the subject, it would be that the property was knocked down upon the consent of the trustee, in which action Mr. Ambrose as receiver did not participate at all?

A. That would be my recollection.

By Mr. Millan:

Q. But you had no independent recollection on the subject?

A. I have no independent recollection, but, as I say, had he had any connection with the transaction I would undoubtedly have remembered it.

Q. There is no doubt in the world, though, Mr. Smith that Mr. Ambrose was there in the capacity of party secured under the trust, that is as receiver?

A. Mr. Ambrose was present at the sale, and he was the party secured.

Q. And he was there in that capacity?

A. I would say that he would have been there in that capacity undoubtedly.

50 Q. And you knew that?

A. I knew that at every stage of this proceeding. I knew that he was the party secured.

Q. And he was the party who was setting Mr. Casilear, the trustee under the deed of trust, in motion? That is, Mr. Casilear was making the sale at the request of Mr. Ambrose?

A. There is no question about that in the world.

Q. According to the usual and ordinary practice, trustees under deeds of trust do not undertake to foreclose them until they are requested to do so by parties secured?

A. I take it that there is no question about that. I want to say further that I would not hesitate if the party secured to bid openly at any trustee sale in the District of Columbia, unless in this case it is held to be improper.

EDWIN L. WILSON, a witness called on behalf of John Lewis Smith, Edwin L. Wilson and Wm. E. Ambrose, defendants in the petition of E. Hilton Jackson, receiver, having been first duly sworn, was examined and testified as follows:

By Mr. Easby-Smith:

Q. Mr. Wilson, have you read your depositions before Mr. Dent in this matter since these hearing- began?

A. I went over the depositions here in the office with you one day.

Q. I want to ask you, just in a general way at first, whether or no you find in them any errors of transcription, apparently?

A. Yes. I wish to state in reference to that that the day I testified in Mr. Dent's office I was at that time taking testimony in a large equity suit. My recollection is that I asked Mr. Jackson to excuse me, and I went up there. I was taking testimony, I think, that very day, and he said he wanted to take depositions that day. So I went up there and waited, and I was very uneasy; I wanted to get away because I had a good deal to do in this equity suit in which I was then taking testimony. But I wanted to accommodate him and wanted to get through with it. I had gone over the facts in a very brief way by going to the title company and seeing their records which did not show all the transactions. The transactions had been some years previous, and I did not remember them as well then as I do now, because I have gone over them in my own mind and have gone over this record since. Some of the statements there in the record are typographical errors. I know one distinctly about Mr. Ambrose signing a check. Mr. Ambrose's signature does not appear on the check, and consequently, I do not think I could have said it, and if I did it was a slip of the tongue.

Q. I direct your attention to the following question and answer on page 444 of volume 4 of the record:

"Q. Will you take this check, which is marked "Marsh No. 4", look at it, and state whether or not that amount of money came into your hands through the Real Estate Title Insurance Company, by way of profit on this transaction?

A. Yes, sir, the check did come into my possession. I see Mr. Ambrose's endorsement on that".

—. Now, I show you the check marked Marsh No. 4", which is a check dated August 25, 1910, payable to your order for $743.68, and ask you to state of Mr. Ambrose's endorsement does appear on it?

A. It does not.

Q. What endorsements do appear on it?

A. Mine is the first endorsement and then appears the endorsement of John Lewis Smith.

Q. At page 446 of your deposition, in volume 4, the same matter is referred to as follows:

"Q. I hand you again what is known here as "Marsh No. 4", and ask you what you did with the check as soon as you got it?

A. I have not any independent recollection of it, except as it appears on the check, the check came into my possession, and seeing Ambrose's endorsement under it would indicate in some way I turned it over to Smith."

—. Do you think you were correctly reported in that matter?

A. No; I do not.

Q. I also call you- attention to the following questions and answers on page 446:

"Q. Did you put up any deposit on that occasion?

A. No. Ambrose told the trustee that he knew me and that a

deposit was unnecessary at that time; he knew I was good for it. I was read though to give a deposit."

"Q. But Ambrose did not require it?

A. No.

Q. But expressly waived it, as you say?

A. Yes; he waived it."

—. Will you state whether that is your recollection of what occurred?

A. That is not what occurred, and I am either incorrectly reported or it was a slip of the tongue. Now, as I recall my appearance at that sale, there were several other bidders besides myself and several people who were not bidding, or apparently not bidding. I had no personal communication with Ambrose or Smith or anybody else at the sale. I went there to bid on the property as a bidder, as anybody else would bid on it. I had no communication with him and, as a matter of fact, I do not think at any time during the sale or the previous sale I had any conversation with Ambrose or anybody else about it. There was a large man, in middle life, who bid on it against me. There possibly were some other bidders at the earlier part of the sale, but they dropped out. This man and I were the two bidders left, and we kept running each other up, and the bidding lasted some time. The advance bids were usually very small. I did not know Ambrose in the transaction as trustee. Casilear was the trustee, as far as I knew, and Weschler was selling the property, and I had no communication with Ambrose at all about the matter. As a matter of fact, in this whole transaction I do not recall ever having had any conversation or communication or transaction with Ambrose until the final closing of the thing, when they could not make title, and I think I met Ambrose in front of my office one day and we were talking about the making of the title and he said something about some communication with Wiltsie, that they were trying to get taxes reduced so they could make title. In the whole transaction that is all the conversation I remember having had with Ambrose about this property.

61 Q. Now, Mr. Wilson, I call your attention to your answer as recorded at the bottom of page 444 and the top of 445, in which several breaks appear marked by the typewriter by dashes, and I read that to you and ask you to state whether or not you were correctly reported, and whether or not this is a correct statement of the facts as you remember them. Mr. Sullivan was interrogating you concerning the taxes, which were large, double or nearly double, the amount of purchase. He asked the following questions:

"Mr. Sullivan: You mean the taxes, including what Wiltsie claimed to release his trust deeds?

"The Witness: Yes, and he could not give me a clear title, because the property was supposed to be sold to clear taxes, and after some negotiations I think Ambrose came to me and said that in the meantime he had arranged this sale to Kite, I think it was through Alan Walker—I am not sure about that, though—had gotten the sale to Kite, and there was good profit in it and they did not want to lose it, and I agreed with Ambrose to pay the difference out of

the purchase price for the taxes, and it was afterwards discovered that there was a rebate or refund due us, because the current taxes were included in that $550."

Now, Mr. Wilson, will you state whether or not, according to your recollection, you were correctly reported in that transcript of the answer?

A. I think not. As I recall, on that particular occasion, at that particular time when I was testifying, Mr. Sullivan had asked me questions along a line that I somewhat resented; and, as I recall, there was some little feeling about it because he had tried to put words in my mouth that I had not said in a private conversation with him and the questioning and answering were somewhat heated and I talked very rapidly. Possibly the stenographer did not get me or possibly my sentences were somewhat broken, but I could not have said what I am quoted [illegible] as saying, that I had any such arrangement with Ambrose, because I never had any communication with Ambrose about this matter. When I went to the first sale of this property I went there as a bidder as anybody else. Mr. Smith has correctly stated it, that he called my attention to it on the street one day. I had gone to other real estate sales and bought other real estate. I did go there as an independent bidder and bid on the property, and it was knocked down to me. Subsequently it was withdrawn from sale. I did not know why. But I think it was Adam Weschler who said something to me about why I took the matter in court and insisted upon the sale being closed, and I said no, I did not care anything about it; it was an immaterial matter; there was not any money involved in it, and I did not want to bother about it; it did not make any difference to me whether I bought or not. Then we walked up the street, five or six of us, and we had this discussion, and Adam Weschler made some remark that if I could get the property around ten cents a foot I could make some kind of profit on it, and then the discussion followed which Mr. Smith has told on the stand that he had, "Well, if you want to buy it, we will go in with you if you want us." I said it was immaterial to me, he could go in or not; it did not make any difference. I
62 did not know the details of the situation. I was simply going there as a bidder on property that was being put up at public auction. I do not know that I read the advertisement. Mr. Smith had suggested to me that the property was going to be sold. I went to one or two other sales and bid on the property that was being sold by the trustees, and I was the unsuccessful bidder. I had no arrangements with anybody about going there to bid. As a matter of fact, at one other sale a client of mine appeared there and bought another piece of property that was put up by one of these trustees, and I bid against him, and he finally got it for $450, and the Government afterwards allowed him in condemnation sale $1,000. I had no interest in that property. I bid against him and my highest bid was $400, because I conscientiously believed that was the highest price I could afford to give for the property. I appeared at another sale in Tennallytown and bid on that independently, and I think Mr. Smith bid against me on that property.

Mr. Millan: It seems to me we are getting very far afield here now.

The Witness: I possibly am, but this is a matter that I want to explain my true situation about, because there was not any collusion about it, and I want to tell the whole story.

By Mr. Easby-Smith:

Q. I want to direct your particular attention, Mr. Wilson, to this statement which you are reported as having made at the other hearing:

"I think Mr. Ambrose came to me and said that in the meantime he had arranged this sale to Kite. I think it was through Allan Walker. I am not sure about that though."

A. That could not be so because I think I was in Mr. Smith's office the following day when he called up Allan Walker about this property, if my recollection is correct about it, and I never had any communication with Ambrose at all about the sale of the property. From my knowledge of it, Allan Walker never had any communication with Ambrose. He was Lewis Smith's client, and I knew that, and I think myself I called up one or two real estate men, and my recollection of it is at the time that Allan Walker remarked that this was such a lot that ought to be sold to a speculative builder.

Q. Now, Mr. Wilson, what, if anything, do you have to say in addition to what you have already testified about your failure to make any deposit at the time of sale or subsequently before the conclusion of the transaction?

A. I knew all these men; they knew me and knew my financial responsibility, that I was certainly good for $100. The first sale was withdrawn, and I made no objection to it, as I have stated. When the second sale was made I offered them a check and they said, "That's all right; we can get a check from you tomorrow."

Q. To whom did you offer the check?

A. I offered it to the auctioneer. I did not know Ambrose in the matter. He had no communication with me. I think he was present at the sale—I am not quite sure he was—but I think I was standing in the crowd on the opposite side from the auctioneer and Casilear, and they were the ones who were doing the talking.

Q. Do you have any recollection as to whether or not Mr. Ambrose and Mr. Casilear were in communication, or whether Mr. Ambrose was in communication with either Mr. Casilear or the auctioneer, when the property was knocked down to you at the second sale?

A. I do not know anything about that. If they were, it did not come under my notice. As I say, I did not know just what the situation was; I did not go in and investigate the title; I had no connection with the matter at all.

Q. What have you to say, if anything, Mr. Wilson, as to any delay in finally closing up this sale?

A. My recollection about it is that when the property was knocked down to me the day of the sale, the next day, or the day after, or a

very short time thereafter, Mr. Smith called up real estate men, Allan Walker being one, and I think I called up one or two, and a very short time after that I think Allan Walker notified us that he had a prospective purchaser; and my recollection is that that was before even the Title Company had handed down the title to the property. I won't say positively, but that is my recollection about it. We were notified—I was notified—of these taxes on there and that they could not make title. The thing was pending for some time and it dragged along for several days, and for several weeks, and, finally, they were able, as I understood it, to make title by some compromise agreement with Wiltsie.

Q. In connection with that, will you state whether or not you made any advance over the price at which the property had been knocked down to you?

A. I think it was stated that if I would agree to make up the small difference on the taxes the title could be made. Well, I consented to that.

Q. Now, Mr. Wilson, have you anything else in mind that you desire to say in amplification of your former testimony?

A. Nothing further than the general statement that I at no time entered into any fraudulent or collusive arrangement or agreement with Ambrose in the matter, and such a thing never entered my mind. I went there as an independent bidder at the first sale and subsequently succeeded in buying the property at the second sale. In fact, I bought it at the first sale, but it was withdrawn. The thing was done in a most casual way. There was no agreement about the thing in any shape or form, except as Mr. Smith has testified that they would go in with me in the matter if I wanted to, and I made the statement that it did not make any difference to me, I would go in with them if they wanted me to.

Q. Can you state how many bidders there were at that sale and about how many bids were made and at about what price the bidding on the property started?

A. There was more bidding at the second sale than there was at the first. There was a fair attendance at the first and there was something more than that at the second. I have not bought any real estate in recent years, but at that time I bought several
64 pieces, along in those years, at auction sales, and in different years. At one time I owned considerable property around Washington. That was as good a sale as I ever attended. I have attended other sales where I did not buy.

Q. Do you distinctly remember any bidders on that occasion, and especially do you remember who was the bidder who bid next higher to you?

A. I do not recall his name, but, as I recall, he was a man in middle life, and the statement was made there that he was keeping a grocery store on the corner. I think after the sale he came up to me and made some remark about his feeling that he had gone as high as he ought to go in bidding on property. He lives in the neighborhood, at least.

Q. Do you recall whether or not there was any other bidder than that particular man?

A. I think there was at the start of the sale, but they all dropped out, and, finally, it narrowed down to the two of us. The sale was a fair open sale; the weather was good, and the bidding was spirited. There were a great many bids made, but the differences in the advance bids were small; that is, sometimes the bid would only be raised five dollars or ten dollars, and, of course, it took quite a time to finally get the property up to the figure at which it was knocked down. I think this man on one or two occasions, before it did reach the price at which it was knocked down to me, delayed several minutes before he would make another bid, and it took considerable time to make the sale.

Cross-examination.

By Mr. Millan:

Q. I have no desire to challenge the correctness of any of the statements that you have made now or ever. I want to just briefly group on the record some of the things that we agree about. You stated in your former testimony that at the first sale you bid $350 and the property was about to be knocked down to you, and they had some conference there. Then you say, "And, of course, I do not know what the conference was because I was not a party to it." Is that statement correct, or is your statement today that you were consulted and your consent had before it was withdrawn, correct?

A. I think it was actually knocked down in that way, that the bidding stopped, and then I think it was Weschler made some remark to me, and I said it didn't make any difference to me, he could withdraw the property if he wanted to.

Q. Mr. Ambrose was at that sale?

A. I think so.

Q. You knew that he was the party secured?

A. I can not say that I did, because my recollection of it is that I knew nothing about this except what Mr. Smith said, that there was going to be a sale of some property and to go over there.

Q. When you found Mr. Ambrose there did you learn in what capacity he was there?

A. I do not know that I did at the first sale.

Q. When did you first become cognizant of the fact that Mr. Ambrose was to share in the profits on the second sale?

A. In that general conversation that we had after the first sale.

65 Q. On the way home from the first sale?

A. Yes. He made some remark that he would go in it too, I believe.

Q. And you assented to that?

A. I did not object to it.

Q. And the property was thereafter advertised for sale on the 28th of June?

A. Yes.

Q. Then you appeared and bid $491?

A. I have not any independent recollection of it at this date.

Q. That is what the record shows. Later it was found that that was not enough to cover the amount that it would take to clear up the taxes, and Mr. Wiltsie's bonuses and tax claims, and you agreed to advance your bid?

A. Yes; because they could not make the title. My recollection of it is that it was narrowed down to a small sum.

Q. And you agreed to stand it?

A. And I agreed to stand it.

Q. As a matter of fact, whether you offered to put up your check or not, and, of course, I accept without reservation your statement that you did, the fact is that you paid in money and you got no deed until the transaction with Kite was ready to be closed, and then the deeds went on record simultaneously?

A. That is true, but after the Title Company had given a statement as to the condition of the title; then the thing was held in abeyance pending the negotiation to make good title.

Q. I notice that Mr. Easby-Smith has examined you—and very properly—from notes made from the former testimony.

A. Yes, sir.

Q. I want to ask you what material errors you have found in your former testimony other than those that you have corrected in response to Mr. Easby-Smith's questions?

A. Of course, I have not the record in mind now. When I went over this record I went over it in this office with Mr. Easby-Smith reading it, and he asked me these questions and those notes were made.

Q. You made notes of everything substantially that you found that was not as it ought to be?

A. According to his suggestions. I think he went through the record and asked me these questions and these notations were made. I did not personally read the record.

Q. Did you have any negotiations with Mr. Kite yourself?

A. I did not know Mr. Kite when I saw him.

Mr. Easby-Smith: Suppose you answer that more categorically.

The Witness: No.

By Mr. Millan:

Q. I call your attention to your deposition the first time you were on the stand before Special Master Dent. You recall that you were on the stand twice?

A. Yes, sir; only from the record. I do not recall it independently of the record. The only recollection of my being on the stand is the time when I testified when Mr. Sullivan was questioning me.

Q. According to the record you were on the stand on August 16, 1915, and were examined by Mr. Jackson, not by Mr. Sullivan, and you are recorded as having said, at page 327, the question being at the foot of page 326:

66 "Q. What did you do with the property? Did you make any payment on it?

"A. I do not think so. Just after the sale somebody came to me—now I have forgotten who it was—and said that Harry A. Kite he thought would buy that property, and asked me for a price on it. The Title Company, I think, was then running the title and it was reported to me for the completion of my sale, and we had some dickering for a day or two and finally Kite came to an agreement with me as to what I would take for my purchase and he agreed to give me that much money, as much as I wanted and was willing to sell for."

A. He did come to an agreement with me, but he came to an agreement with me through the agent, Allan A. Walker.

Q. You never came into contact with him at all?

A. No.

Q. Your attention has been called here today doubtless to the fact that the contract of sale bears date of July 6, 1910.

A. I think so; yes, sir.

Q. That was eight days after the auction sale?

A. Yes, sir.

Q. What do you say now as to this statement that the Title Company having examined the title and reported your——

Mr. Easby-Smith (Interrupting): Mr. Millan, have you not put a wrong construction on that? Did you not read Mr. Wilson's testimony to the effect that he thought the Title Company was then examining the record?

Mr. Millan: I again quote from the record:

"The Title Company, I think, was then running the title and it was reported to me for the completion of my sale, and we had some dickering."

The Witness: I have testified to that today. That is substantially correct, only it is not in detail.

By Mr. Millan:

Q. Do you mean to say this title was reported to you for completion of your sale eight days after the auction sale?

A. No; I do not know that that construction can be placed on my answer.

Q. That was not what you intended, at any rate?

A. Why, no.

Q. When was it brought to your attention that the price to be had for the property was $1400?

A. When Mr. Walker reported that he was negotiating with Kite and had gotten the proposition out of him for that amount.

Q. Then, Mr. Walker reported to you that Kite was willing to pay you $1400?

A. I think so; yes. He was the only man I could learn it from.

Q. Did you give Mr. Walker a price when you bought the property of him?

A. No, sir.

Q. What instructions did you give him?

A. My recollection of it is that John Lewis Smith called him up over the telephone.

Q. And you were present?

A. I think I was. I put the property in his hands.

67 Q. The next thing you knew was that it was a $1400 offer and you said yes?

A. Yes.

Q. And the contract was brought to you and you signed it?

A. Yes.

Q. And you knew then that Mr. Ambrose as the receiver of the Building Association was the party secured under that deed of trust, did you?

A. I possibly did. I did not investigate the record.

Q. You knew that fact also when you made this arrangement for the three of you to go into this transaction together? You knew that Ambrose as the receiver was the party secured?

A. I do not know, Mr. Millan; I could not say positively at this time. I would not want to absolutely deny that I knew it in a general way.

Q. Did you look at your deed that you got, Mr. Wilson? You got a deed from the trustee, Casilear?

A. The transaction was all closed at one time.

Q. You saw the deed?

A. I do not know that I did. It was all closed by the Title Company at one time. I did not read it over. I think the deed was the Title Company's regular printed deed.

Q. Reciting that the sale had been made at the instance of Mr. Ambrose?

A. I do not remember that.

Redirect examination.

By Mr. Easby-Smith:

Q. Can you state whether or not you had any knowledge as to the condition of taxes on that property prior to or at the time of the second auction sale?

A. No; and at either sale I knew nothing about the title or the condition or anything about it. I did not investigate it. I simply went there as a bidder and I knew nothing about the situation at all.

By the Master:

Q. Now, Mr. Wilson, I want to get a little clearer statement, please, as to the exact agreement as well as the terms of it that was entered into between yourself and Mr. Ambrose and Mr. Smith, as I understand made at the time you were coming from that first sale.

A. I do not know that I can state it any plainer than I have, Mr. Hoehling. The thing was done in a very general way. John Lewis Smith said something—and I cannot at this time quote his exact language—but he said something about going in as a joint purchaser or going in interest with me in case I did go up and bid on the prop-

erty at the second sale. I made the remark that I did not care; I would either go and bid on it myself independently, or he could take an interest in it if he wanted to; it didn't make any difference to me. It was done in that general way.

Q. How did Mr. Ambrose come into it?

A. Ambrose was in the party, and he made some remark that he would go in it too.

68 Q. That is, in the event that you should happen to become the purchaser at the second sale?

A. In the event that I should happen to become the purchaser at the second sale; and, of course, that naturally carried with it the understanding that if they did take an interest in it we were liable jointly for the purchase price and any expenses incident to the purchase of the property.

Q. What understanding, if any, was there between the three of you in respect to the maximum amount that you should bid at the second sale?

A. Absolutely none—

—There was nothing ever mentioned about that; I was to rely absolutely upon my own judgment because nothing was ever said about it. The only thing ever said about any price was what Adam Weschler said about anybody who would buy property in Washington at 10 cents would get it cheap. I recall the statement because previous to that, several years before that, I had attended one or two sales and a man in whom I had a great deal of confidence had made the same general statement, and he always went to the purchase of small property with that idea in mind, that if he could get any property in Washington at ten cents or under he would get it cheap; that is he could afford to speculate upon it.

Q. At about what rate per foot was the $491? It was under 10¢?

A. I think so; yes, sir.

Q. In making that bid of $491, I assume from what you have just stated that that was your individual judgment as to the amount of your bid?

A. Absolutely.

Q. And that had been left to you?

A. Yes, sir. There was nothing ever said by anybody other than what I have said to you that occurred in the conversation subsequent to the first sale.

Q. Now, in submitting that bid of $491, it was your understanding, I take it from what you have said that the three of you would contribute equally to that amount?

A. Yes.

Q. I mean when you made that bid it was your understanding that they were behind you to that extent?

A. Yes.

Q. Who notified you of the time of the second sale? How did you know when the second sale would take place?

A. I do not remember about that.

Q. You say Mr. Smith called your attention to the time and place of the first sale?

A. Yes, sir.

Q. How did you have notice of the second sale?

A. I do not recall just now, but, of course, I got notice of it in some way. I went there.

Q. Do you recall if you saw the readvertisement?

A. I do not remember about that, probably Mr. Smith told me. I do not recall ever seeing any advertisement about the property at all.

Q. It seems to be agreed in this case that as a part of the closing of the resale of the property made by you to Mr. Kite that you agreed to raise the amount of your bid of $491 some $40, in order to look out for some back taxes, etc. Do you recall whether or not you consulted Mr. Ambrose and Mr. Smith before consenting to contribute that additional amount?

69

A. No; I think I was asked whether I would agree to it, and I said yes.

Mr. Easby-Smith: Asked by whom?

The Witness: I do not recall now, but the only recollection of any conversation I had with Mr. Ambrose was as I stated before in front of the Federal Building, where I then had my office, and he said they were trying to straighten out the title, that there was some difference as to taxes, and that they had not gotten Wiltsie to knock off as much, I believe, and whether I had asked in that conversation or by somebody else at some other time I do not remember; possibly in that conversation or Ambrose suggested it. But that is the only conversation I ever remember having with Earl Ambrose about the matter.

By the Master:

Q. Now, when Mr. Walker communicated to you, whether in the form of that signed contract or otherwise, the fact that he had an offer for $1400, did you consult Mr. John Lewis Smith or Mr. Ambrose, both or either of them, as to accepting it?

A. I never consulted Ambrose. I may have gotten it through John Lewis Smith. If I got it through John Lewis Smith, of course, we naturally talked it over. If I got it directly from Allan Walker I did not, because I at that time remember distinctly that I thought I was getting a pretty good price for the property. In fact, I was astonished at the high offer. I thought it was a pretty good offer because I figured that the sale was going pretty close up to what a man buying it at auction sale could afford to give for it.

Q. Do you remember after you closed the contract of sale to Mr. Kite you communicated the fact to Mr. Ambrose? I mean prior to the consummation of the purchase price.

A. I would not like to say. The only recollection of when I had any conversation with Earl Ambrose is when I stated.

By Mr. Easby-Smith:

Q. Were you at the Title Company when the matter was finally closed?

A. I think so. I know I was at the Title Company once and possibly twice. I went over there to attend to it.

Q. Do you recall who else was there on that occasion?

A. I do not know; I do not remember; but I think I went to the Title Company and signed the necessary papers over there, and I think Marsh, the settlement clerk, settled the matter. I think I went to the Title Company once or twice about it. I know I went to the Title Company about it, but who was present at any time I do not recollect now.

By the Master:

Q. There is just one further matter that I think ought to be cleared up a little bit. To what extent at all, if you know, did Mr. Ambrose participate in the second deed of trust sale? I mean
70 to say physically participate in connection with the knocking down of the property to you?

A. Absolutely none as far as I know anything about it.

Q. Was he there?

A. I think he was.

Q. Do you know whether he was in communication during the offering of the property or knocking it down to the trustee, one or both?

A. I do not recall that he was. I did not pay any attention to them. There was quite a crowd there at the second sale. There were nearly twice as many people at the second sale as there were at the first. There was quite a large attendance at the second sale, and I think that Mr. Ambrose was there, but just what conversation he had with the trustee or the auctioneer, or John Lewis Smith, I do not know. He did not have any with me.

Q. Did you see him in consultation with him while the sale was going on?

A. I would not recall that.

By Mr. Millan:

Q. Do you remember how long a time elapsed between the two auction sales?

A. Only from the record, Mr. Millan; I do not remember now.

Q. It was but a very short time, was it not?

A. I do not recall, Mr. Millan, except what the record shows. That has been seven years now.

The Master: As a matter of fact, how long was it? I think it would be a good place to put it in.

Mr. Millan: The second sale was on the 28th of June, and the first sale was June 6. That is subject to verification by the record. It appears here somewhere.

By Mr. Millan:

Q. Was any reason given to you for withdrawing the property at that first sale?

A. No; I think not. I recall my stating that the matter was——

Q. Immaterial to you?

A. Immaterial to me. I did not care.

Q. He did not give you any reason at all?
A. No.
Q. Did you understand it was an inadequacy of price?
A. I say I do not recall.
Q. You told Mr. Hoehling that Mr. Ambrose was present at the second sale. Mr. Smith was also present?
A. I think so.
Q. There was no difficulty about their knowing what amount you were bidding?
A. I do not think there was. The bidding was open and everybody knew what I was bidding.
Q. You spoke of the offer from Mr. Kite probably coming through Mr. Smith. As a mater of fact, Mr. Smith was the one who had put the property with Mr. Kite, was he not?
A. No.

Mr. Easby-Smith: Do you mean Mr. Smith?
Mr. Millan: I mean Mr. Walker. As a matter of fact, Mr. Smith was the one who had placed the property with Mr. Walker?
The Witness: *Hes*; he called up Mr. Walker over the tele-
71 phone.
Mr. Millan: So that any offer would naturally come through Mr. Smith.
The Witness: It probably would.

Redirect examination.

By Mr. Easby-Smith:

Q. Mr. Wilson, the deed of Raphael A. Casilear, surviving trustee, to you, by which this property was transferred, after you bid it in, recites, among other things, that the property was sold by William E. Ambrose, Receiver in Equity Cause No. 27845, after previous public advertisement, etc. Do you recall whether or not the original deed was ever delivered to you, and whether or not you had any occasion to read that deed?
A. I do not think it was delivered to me. I think the whole thing was settled up in the title company, and when the transfer was made to Kite, I went over and signed the deed transferring it. It was all done at one and the same time.
Q. Do you have any recollection at all of having ever seen or read the deed from Casilear to you?
A. No.

No recross-examination.

Witness excused.

Report of receiver, filed Feb. 4, 1916, referring to finding of the Special Master in favor of the creditors, stated that the consideration of the same by the court would "result in a decree awarding practically the entire funds in the hands of your receivers to preferred creditors of the association, or, on the other hand, in a decree leaving intact a substantial part of said funds for distribution among the stockholders."

On petition of the receiver, filed Feb. 8, 1916, referring to the questions raised in his reports of Jan. 28 and Feb. 4, 1916, an order was passed same date authorizing him to employ counsel.

On Feb. 11, 1916, the receiver filed his report setting up that the amount of $33,889.39 with which the former receiver had charged himself in his account was furnished by his surety and submitting an offer of the said surety to pay over the sum of $16,110.61, being the amount necessary to equal the full liability on its bond, and on the 16th of the same month the receiver was authorized to accept the offer of the said surety company.

The order authorizing the acceptance of said order further provided: "But this order especially reserves to the Receiver the exclusive and full right to proceed, if he is so advised, against the former Receiver for his defalcations herein and against any person or persons or corporations, other than the American Bonding Company, participating with the former Receiver in the unlawful or improper conversion of any of the trust funds herein, or subject to any liability whatever in that connection, provided, however, that this recovery is to be limited in any event to the defalcations
72 of said Ambrose as shown by the report of the Special Master herein, less the sums paid and to be paid by the American Bonding Company as shown by the petition and this decree."

On Feb. 18, 1916, the report of the Special Master was confirmed with modifications and the funds directed to be applied in settlement of the claims of the aforementioned creditors.

On Feb. 18, 1916, upon his report, the receiver was excused from bringing any action against the directors of the defendant corporation for the purpose of attempting to enforce liability against them for the defalcations of the secretary Miller, said report stating that the receiver was advised by counsel that said directors were not liable.

Supplemental report of the Special Master, filed Feb. 23, 1916, shows a balance in the hands of the receiver of $1746.56 after the payment of creditors referred to in said order under decree of the court, and after applying the amount received from the surety of the former receiver in full settlement, and after allowances by order of court to the receiver and counsel.

Further allowances were made to the receiver and his counsel by orders of Feb. 25 and March 30, 1916, and by his petition filed June 21, 1916, he shows a balance on his hands of $98.19.

Report of receiver filed Dec. 1, 1916, alleges balance due by the former receiver under Special Master's report of $15,803.65, with interest from July 21, 1915, and asking authority to institute proceedings against the former receiver.

On Dec. 8, 1916, on consideration of the report of the receiver an order was passed excusing him from proceeding against any banks with which the former receiver had deposited for liability for conversion of the funds, said report stating that the Receiver was advised by counsel that said banks were not liable; and authorized and directed him to proceed against the former receiver for the balance of fund due by him and also referring the matter in question on appeal to the Special Master as set out in the transcript of record.

April 4, 1917, the receiver and the plaintiffs in the suit filed a

petition asking for a decree against the former receiver for the balance due, to which petition April 24, 1917, former receiver Ambrose filed an answer submitting his interests to the jurisdiction and judgment of the court and on June 8, 1917, the court entered a decree against Ambrose, with h[illegible] counsel's consent, in favor of the receiver and to operate as a judgment at law for the balance of $16,894.65 with interest.

The report of receiver filed Aug. 24, 1917, shows further payments to his counsel and in settlement of the remainder of his commissions, and a balance in his hands of $322.11, which account and report were approved by order of court, Aug. 27, 1917; the said order providing that the allowances to the counsel for the receiver should be in full of services to date except as to two matters mentioned in the bill of said attorneys attached to said report, the said two matters being the matter of decree against Ambrose and the claim against Smith and Wilson, as to which matters the order reserved the question of further allowance to said attorneys.

73 Order of Jan. 11, 1918, authorized the payment by the receiver to the stenographer before Special Master Hoehling of $56.25 without prejudice to the rights of the receiver to recover.

The foregoing statement, agreed to by counsel, embodies all the evidence necessary to set forth on appeal, except the particular facts of the transaction involved, which are not controverted and are set forth fully in the report of Special Master Hoehling, which report, as to the findings of fact, was confirmed by the court, but the said statement of evidence, including the record in full of the testimony of the respondents, Messrs. Smith and Wilson, both before Special Master Dent and Special Master Hoehling, is approved as such to be filed and become a part of the record for the purpose of appeal to the Court of Appeals of the District of Columbia, this 13th day of May 1918.

WENDELL P. STAFFORD,
Justice.

[Endorsed:] Equity #27,845. Cora Bail et al., vs. First Cooperative Building Association of Georgetown, D. C., et al. Statement of evidence on Appeal. Louis Addison Dent, Attorney and Counsellor at Law, Washington, D. C., Woodward Building.

Endorsed on cover: District of Columbia Supreme Court. No. 3194. John Lewis Smith et al., appellants, vs. E. Hilton Jackson, receiver, etc. Court of Appeals, District of Columbia. Filed Jun 25, 1918. Henry W. Hodges, clerk.

74 Wednesday, March 5th, A. D. 1919.

* * * * * * *

No. 3194.

JOHN LEWIS SMITH and EDWIN L. WILSON, Appellants,

vs.

E. HILTON JACKSON, Receiver of the First Cooperative Building Association of Georgetown, D. C.

The argument in the above entitled cause was commenced by Mr. John Lewis Smith, attorney for the appellants, and was continued by Mr. W. W. Millan, attorney for the appellee, and was concluded by Mr. L. A. Dent, attorney for the appellants.

Court of Appeals of the District of Columbia.

No. 3194.

JOHN LEWIS SMITH and EDWIN L. WILSON, Appellants,

v.

E. HILTON JACKSON, Receiver of The First Cooperative Building Association of Georgetown, D. C., Appellee.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

This is an appeal from a decree in the Supreme Court of the District sustaining exceptions to a special master's report and granting appellee, as receiver, judgment as at law against appellants. The amount allowed represents the profit on the resale of a parcel of land sold at the request of the former receiver in this cause by the surviving trustee under a deed of trust securing a debt to the First Cooperative Building Association. Appellant Wilson was the purchaser at the trustee's sale, the understanding being that appellant Smith, an attorney of the former receiver, and the receiver himself should share in the venture.

On June 6, 1908, stockholders of the First Cooperative Building Association of Georgetown, D. C., filed a bill for dissolution and the appointment of a receiver. William E. Ambrose was appointed receiver and he duly qualified as such. On June 28, 1915, the resignation of Ambrose as receiver was accepted and the appellee appointed in his stead. There was a reference to a master, who in his report filed in December of 1915, charged the accounts of the former receiver with the profit upon the resale of the property, from which

the sum now in controversy was derived. The receiver then made claim against appellants and the matter, having been brought to the attention of the court, was referred to another special master, "with reservation, however, of the right of a review by the court of the said special master's report, both as to findings of fact and conclusions of law." Testimony was adduced and hearings had before the special master who, on April 19, 1917, filed a report. His findings of fact, adopted by the court, are in substance as follows: The Building Association was the holder of certain debts due it from borrowing stockholders for money advanced. These debts were secured by deeds of trust upon real estate. It was the duty of Ambrose as receiver to take appropriate action looking to the conservation of the assets of the association. Frederick S. Schwab had borrowed $2,700, secured by a deed of trust dated August 10, 1899, conveying the property in question to Jessie H. Wilson (since deceased) and Raphael A. Casilear as trustees. At the request of the receiver, the surviving trustee advertised the property for sale at public auction on Thursday, June 16, 1910. The sale was held on the day named and Mr. Wilson, one of the appellants, bid $350 (4½ cents per square foot) for the property and it was knocked down to him, but the property was withdrawn by the trustee upon the ground that the bid was inadequate. The sale, so far as appears, was properly advertised and regular in every respect. As the auctioneer, Ambrose, Smith and Wilson were leaving the premises, the auctioneer remarked that any property in the city that could be bought for ten cents a foot, or under, was cheap property. Thereupon Smith remarked to Wilson that if he, Wilson, wanted to bid again he, Smith, would be willing to take an interest in the property if Wilson should be the highest bidder, and Ambrose stated that "he would go in too." The special master found that "Wilson was to use his own judgment in bidding on the property at the second sale, both as to bidding at all and as to the amount of his bid; and if he should happen to become the purchaser thereof, the three persons named should be jointly liable for the purchase price and any expenses incident to the purchase of the property; and they should, also, be jointly interested in the property itself." On the next day, that is on June 17, 1910, the trustee again advertised the property for sale at public auction, the sale to be held on Tuesday, June 28, 1910. At the second sale "Wilson in competition with one or more bidders, finally made a bid of $491 for the property, which was at the rate of 6½ cents per square foot, and the property was knocked down to him at that figure. * * * It appears that Mr. Wilson made his bid for the property at this second sale in the exercise of his own individual judgment, and without any previous conference with either Messrs. Ambrose or Smith. * * * While Mr. Ambrose and Mr. Smith were both present at the second sale, there is no evidence that Mr. Smith participated therein in any way, either in the conduct of the sale, or in the acceptance of the bid of Mr. Wilson; nor is there any evidence that Mr. Ambrose gave any instruction or directions to the auctioneer or trustee in regard to the matter; the testimony of the auctioneer being to the effect that the ordinary

course at such sales is for him to take the final instructions of the trustee, although, because of the lapse of time he had no definite recollection as to the matter in this particular case."

After the second sale Smith and Wilson succeeded in interesting real estate agents in the property and, within a few days, obtained a purchaser for $1,400. It developed that there were unpaid taxes upon the property and that there had been a tax sale. The holder of the tax deed agreed to compromise for $550, or $50 more than Wilson's bid. "Wilson agreed to advance his bid to the extent of the additional amount needed to free the property of taxes, etc., in order that good title thereto might be conveyed to Kite, free and clear of taxes, tax deeds, etc." It resulted, therefore, that the Building Association received nothing from the transaction. The special master expressly found that there was no evidence of any improper influence at the sale to prevent competition or to close competitive bidding, or to bring about the sale of the property to Wilson in preference to any one else. "On the contrary," says the report, "it appears that the sale was fairly conducted; that there was competitive bidding, and that the property finally was knocked down to the highest bidder."

The learned trial justice was of the view that the duty of Ambrose with respect to the property was such "that his conduct was a palpable violation of his duty;" that the purchase and resale was a joint enterprise, conducted with full knowledge of the surrounding circumstances, and hence that the profits realized were impressed with a constructive trust in favor of the present receiver.

In Anderson v. White, 2 App. D. C., 408, and Insurance Co. v. Barker, 17 App. D. C., 265, this court pointed out the difference between the rule applicable to cases of sales by trustees appointed by the court, "such as trusts to sell for partition or distribution and the like," and "sales made under the ordinary trust to secure loans, and enforceable upon stipulated terms and notices." In the former, the interests of the beneficiaries are identical and the trustee is charged with the absolute duty so to arrange and conduct the sale as to secure the highest possible price for the property; in the latter, it is the duty of the trustee, upon demand of the security holder after default, to conduct the sale "in the manner and upon the notice prescribed in the trust." The title under these deeds of trust is not in the creditor but in the trustees, whose duties are set forth in the deed and who really act independently of either party. Chesapeake B. R. Co. v. Washington P. & C. R. Co., 27 App. D. C., 587, 599. Their sole duty is to conduct the sale in accordance with their grant of power, extinguish the debt if possible, and hold any balance for the grantor. While, therefore, a mortgagee or a trustee in a mortgage or deed of trust may not become the purchaser at his own sale, unless permitted by the terms of the instrument or authorized by statute, a creditor secured by such mortgage or trust may do so. Not holding the legal title, he is not a trustee for the debtor in such sense as to preclude him from buying at the sale. This was expressly ruled in Smith v. Black, trustee, 115 U. S., 308. That case arose in the District of Columbia and the court said that

"the creditor for the satisfaction of whose debt the sale is made, has a right to compete fairly at the sale, and may become the purchaser." In Twin-Lick Oil Co. v. Marbury, 91 U. S., 587, 590, the court said: "The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted, and who in this respect was the trustee of the corporation (the grantor in the deed of trust), and must be supposed to have been selected by it for the exercise of this power." See D. C. Code, sec. 544.

Coming now to the facts of this case, we are unable to agree with the learned trial justice that the real owner of this property was the association, represented by the receiver. The legal title was in the surviving trustee, the equitable title in the debtor. While it was the duty of the receiver to notify the trustee of the debtor's default and request a sale of the property, his positive duty ended there. Responsibility for the conduct of the sale rested upon the trustee. This must be so, else the creditor secured by the deed of trust, in this instance the Building Association, would not be permitted to bid at the sale, for obviously one may not be both seller and buyer. Although the receiver was chargeable with no further positive duty, nevertheless his acts should receive the close scrutiny of the court. Evidence warranting the inference that the conduct of the receiver, chargeable also to the purchaser, was to the prejudice of the creditor, would warrant the setting aside of the sale if the title had not passed to an innocent purchaser. Does the evidence before us warrant such an inference? That the sale was regularly and fairly conducted is conceded. "No fraud in fact is alleged in the bill or shown in the evidence, no effort to keep bidders away from the sale, or to have a surreptitious sale, no want of the usual notice of sale, * * *." Smith v. Black, 115 U. S., 308, 315. On the contrary, this was a second sale and it affirmatively appears that there was competitive bidding. There is no evidence challenging the good faith or judgment of the trustee. The special master found that the price for which the property sold was not "necessarily inadequate in a legal sense." It is conceded that the price obtained at the resale was a good one. Having in mind conditions that obtained, including the outstanding tax title, we certainly could not find that the price realized at the trustee's sale was so grossly inadequate as to shock the conscience of the court and furnish a basis for the setting aside of the sale. Indeed, we do not understand counsel for the appellee to contend that there is any basis for the setting aside of this sale; but, whether or not we correctly apprehend counsel's position, we are convinced that there is no ground for such a contention. In other words, on the admitted facts we are satisfied that the sale was regularly and fairly conducted and that the conduct of Ambrose in respect of the bid was in no way prejudicial to the creditor, the Building Association. In the absence of any evidence from which we might find that the interests of the association were prejudiced by the conduct of the receiver and appellants, no theory is apparent upon which a judgment against them could be based.

It follows that the decree must be reversed, with costs, and it is so ordered.

Reversed.

Monday, March 31st, A. D. 1919.

* * * * * * *

No. 3194, January Term, 1919.

JOHN LEWIS SMITH and EDWIN L. WILSON, Appellants,

vs.

E. HILTON JACKSON, Receiver of the First Co-operative Building Association *Association* of Georgetown, D. C.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby reversed with costs, and that this cause be, and the same is hereby remanded to the said Supreme Court of the District of Columbia.

Per MR. JUSTICE ROBB,
March 31, 1919.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 77 inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of John Lewis Smith and Edwin L. Wilson, Appellants, vs. E. Hilton Jackson, Receiver of the First Co-Operative Building Association of Georgetown, D. C., No. 3194, January Term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 23rd day of May, A. D. 1919.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

79 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit in which John Lewis Smith and Edwin L. Wilson are appellants, and E. Hilton Jackson, Receiver of the First Co-operative Building Association of Georgetown, D. C., is appellee, No. 3194, which suit was removed into the said Court of Appeals by virtue of an appeal from the Supreme Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the Supreme Court of the United States,

80 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of October, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

81 [Endorsed:] No. 3194. File No. 27,174. Supreme Court of the United States, No. 419, October Term, 1919. E. Hilton Jackson, Receiver etc., vs. John Lewis Smith and Edwin L. Wilson. Writ of Certiorari. Court of Appeals, District of Columbia. Filed Oct. 21, 1919. Henry W. Hodges, Clerk.

82 In the Court of Appeals of the District of Columbia.

October Term, 1918.

No. 3194.

JOHN LEWIS SMITH and EDWIN L. WILSON, Appellants,

vs.

E. HILTON JACKSON, Receiver of The First Co-Operative Building Association of Georgetown, D. C., Appellee.

Stipulation.

It is hereby stipulated by and between the parties hereto, by their respective counsel, that the certified copy of the record heretofore filed by the Appellee in the office of the Clerk of the Supreme Court of the United States with his petition for writ of certiorari which has been docketed as cause No. 419, October Term, 1919 in said

Court, may be taken and considered as the return of the Court of Appeals of the District of Columbia to the writ of certiorari issued by the said Supreme Court in said cause.

LOUIS A. DENT,
Attorney for Appellants.
W. W. MILLAN,
Attorney for Appellee.

(Indorsed: Court of Appeals of the District of Columbia, No. 3194. October Term, 1918. John Lewis Smith and Edwin L. Wilson, Appellants, vs. E. Hilton Jackson, Receiver, etc., Appellee. Stipulation of Counsel. Court of Appeals District of Columbia. Filed October 21, 1919. Henry W. Hodges, Clerk.)

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify, in obedience to the writ of certiorari hereto attached and returned herewith, the foregoing to be a true and correct copy of the stipulation of counsel filed in said cause on the 21st day of October, A. D. 1919.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, District of Columbia, this 21st day October, A. D. 1919.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk.

83 [Endorsed:] File No. 27174. Supreme Court U. S. October Term, 1919. Term No. 419. E. Hilton Jackson, Receiver, Petitioner, vs. John Lewis Smith et al. Writ of Certiorari and Return. Filed Oct. 22, 1919.

Supreme Court, U.
FILED
JUN 21 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 4[redacted]130

E. HILTON JACKSON, Receiver of the First Co-operative Building Association of Georgetown, D. C., Petitioner,

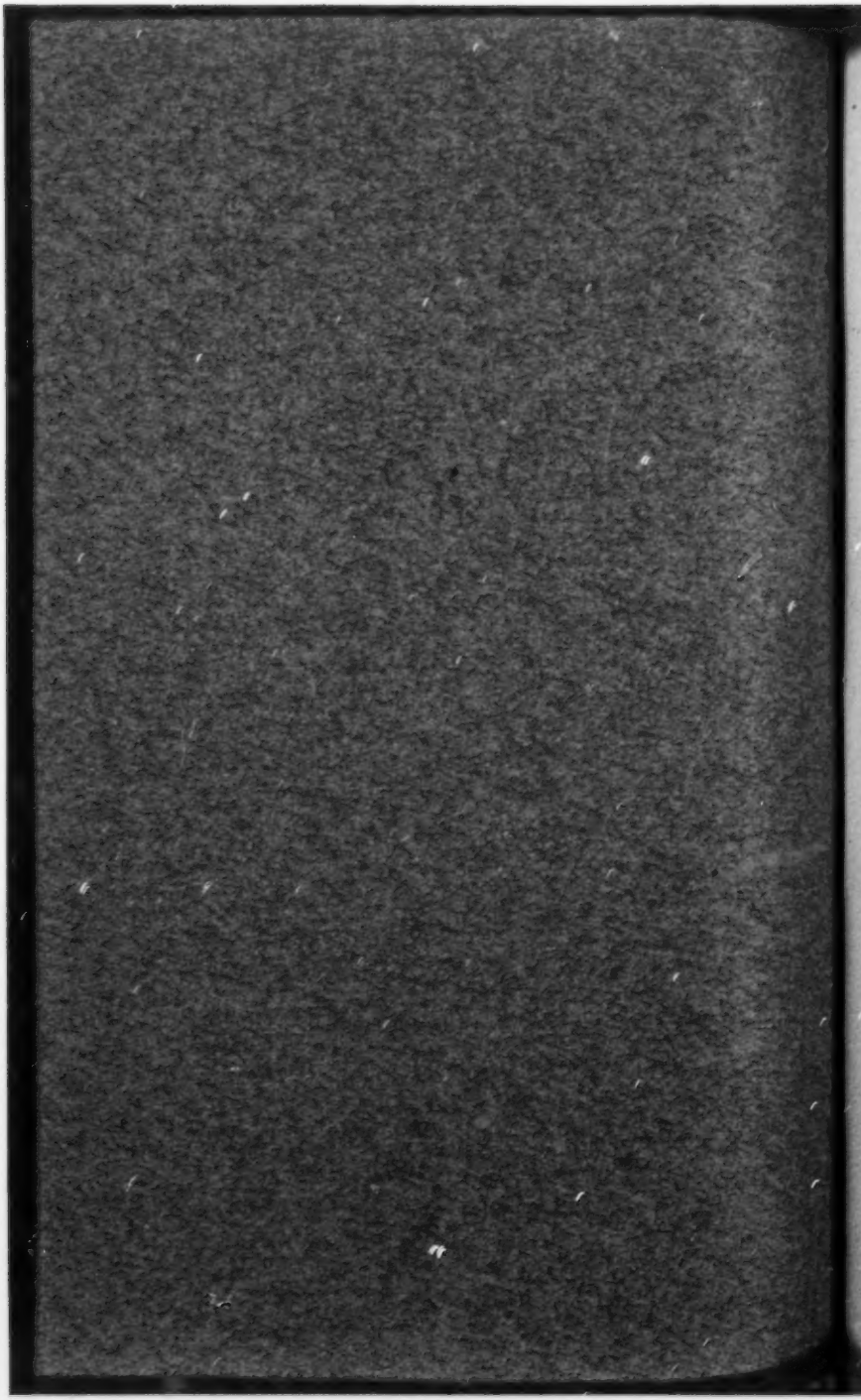
vs.

JOHN LEWIS SMITH and EDWIN L. WILSON.

PETITION FOR CERTIORARI

E. HILTON JACKSON,
Petitioner.

By W. W. MILLAN,
His Attorney.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No.

E. HILTON JACKSON, RECEIVER OF THE FIRST CO-OPERATIVE BUILDING ASSOCIATION OF GEORGETOWN, D. C., PETITIONER.

vs.

JOHN LEWIS SMITH AND EDWIN L. WILSON.

PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, E. Hilton Jackson, receiver of the First Co-operative Building Association of Georgetown, D. C., respectfully shows to the court:

1. On the 28th day of June, A. D. 1915, by an order of the Supreme Court of the District of Columbia, passed in a certain cause then pending therein, known as Equity Cause No. 27,845, and entitled Cora Ball *et al.*, complainants, *vs.*

First Co-operative Building Association of Georgetown, D. C., *et al.*, defendants, petitioner was appointed as receiver of said building association, in the place and stead of one William E. Ambrose, who had been appointed such receiver by said court, by its order passed in said cause on July 11, 1908, and had served as such until the day of petitioner's appointment as aforesaid, when his resignation had been accepted. The bill in said cause was filed by certain stockholders of said building association and prayed for an injunction, dissolution, and receiver.

2. Said building association, at the time of the institution of said cause, was the holder of divers debts due to it from sundry of its stockholders, to whom it had made loans, secured by deeds of trust on real estate, which debts passed to said Ambrose as such receiver upon his appointment. One of these was a debt of $2,700, secured by a deed of trust to one Jesse H. Wilson and one Raphael A. Casilear as trustees. Payments on said debt being in default, said Ambrose caused the property covered by said deed of trust to be advertised for sale by public auction on June 10, 1910, by said Casilear, surviving trustee, the trustee Wilson being dead. The highest bid, $350.00, was made by Edwin L. Wilson, a member of the bar of said court. The property was withdrawn by the trustee on the ground that the bid was inadequate. On the same day the receiver, Ambrose, said Edwin L. Wilson, and John Lewis Smith, who was at the time attorney for said receiver, entered into an arrangement by which it was agreed that if Wilson would bid on the property again when it was advertised for sale said Ambrose and said Smith would take interests in the purchase jointly with him if he should become the purchaser. As a result of this agreement said Ambrose, on the following day, caused the property to be again advertised for sale by public auction on June 28, 1910, and on that date said Wilson became the purchaser for his highest bid, made after some competition, of $491.00.

3. About eight days after the auction sale, and before the purchase price had been paid, a sale of said property for $1,400 was effected by real estate brokers employed by said Smith, acting for said Ambrose, said Wilson, and himself, and the net profit was divided equally among the three, namely, Ambrose, the receiver; Smith, his attorney, and Wilson, the ostensible purchaser. When the transaction was ready to be closed said Casilear made a deed to said Wilson, and said Wilson made a deed to the purchaser at the $1,400.00 sale. These deeds were recorded simultaneously and Mr. Wilson never paid out any money. There was nothing paid the receiver, as such, the taxes and tax liens against the property being in excess of the amount of Wilson's bid and he having voluntarily raised it $59.00 in order to satisfy the taxes and tax liens.

4. Your petitioner became apprised of the facts stated in the second and third paragraphs hereof after entering upon his duties as such receiver, and reported them in substance to said court on January 28, 1916. By a further report filed in cause on December 1, 1916, petitioner informed said court that he had had various negotiations with said Smith and said Wilson concerning the claim which he had made against them for the whole of the profits on the sale aforesaid, resulting in a proposal by them to submit said claim to arbitration. The accounts of said Ambrose, which had been referred, in the meantime, to a special master, had already been surcharged with the whole of said profit, but he had not, nor has he yet, paid the same. Said court declined to submit the claim to an arbitrator or arbitrators with final authority, but, by consent of counsel for said Smith and Wilson, referred it to a special master by an order passed December 8, 1916, directing him to report his findings of fact and conclusions of law, but reserving to the court the right to review such findings and conclusions on exceptions filed by either party.

5. Said special master, after hearing testimony and argu-

ment, in a report, filed April 19, 1917, found in favor of said Smith and said Wilson and against petitioner, but upon exceptions filed by petitioner the said Supreme Court of the District of Columbia reversed the special master with respect to his application of the law to the facts of the transaction, and on the first day of February, 1918, passed a decree holding said Smith and said Wilson liable to petitioner for the whole of said profits.

6. From said decree said John Lewis Smith and said Edwin L. Wilson duly prosecuted an appeal to the Court of Appeals of the District of Columbia, and that court, in an opinion and order filed on the 31st day of March, A. D. 1919, reversed the Supreme Court of the District of Columbia. Whereupon petitioner, on the 16th day of April, A. D. 1919, filed in said Court of Appeals his motion for a rehearing and, if that should be denied, that the mandate of said Court of Appeals be stayed in order to allow him to present to this court a petition for a writ of certiorari to said Court of Appeals, to the end that its said action might be reviewed by this court. Said Court of Appeals, on the 17th day of April, 1919, denied the said motion for a rehearing and granted that for stay of mandate until the further order of the court, but thereafter, on May 22, 1919, ordered its mandate to issue forthwith, and thereupon, on said last-mentioned date, sent to the Supreme Court of the District of Columbia its mandate in accordance with said opinion and order of March 31, 1919.

7. The Court of Appeals of the District of Columbia, as will appear from its opinion in the record which is filed herewith, bases its action upon the conclusion that the sale made by said Casilear was regular and that therefore the title acquired by the purchaser Wilson should not be disturbed, and ignored the theory upon which petitioner's claim was based, namely, that it was not lawful for the receiver, Ambrose, to make a profit out of the sale, or for said Smith and said Wilson to share in such profit.

The review sought by the petition and writ prayed for is, then, of a case substantially as follows:

A member of the bar of the Supreme Court of the District of Columbia appointed receiver of a bankrupt building and loan association by said court, entered into a secret agreement with two other members of said bar, whereby and in pursuance of which one of the last-mentioned attorneys purchased in his own name, but for the use and benefit of the three men, certain real property covered by a deed of trust to secure a loan made by said association.

The purchase was at a foreclosure sale, ordered by said receiver and conducted by the surviving trustee under the deed of trust. The price paid for the property was about one-fifth of the amount of the loan.

Within a few days thereafter, the property was sold by said attorney and a large profit realized therefrom, which was divided among the three parties to the agreement.

In a proceeding instituted by a substituted receiver, the Supreme Court of the District of Columbia decreed that the parties to the agreement should account to him for the profit thus received. (See copy of the court's opinion, which is a part of the record.)

This decree has been reversed by the Court of Appeals, its opinion and decision holding, in effect, that such a transaction is lawful. (See copy of its opinion, which is a part of the record.)

It is respectfully urged that the rule so laid down by the Court of Appeals is contrary to the decisions of this court and to the decisions of all other courts, so far as we can find. It is submitted that its effect is calculated to encourage the trafficking, by receivers and other fiduciaries, in the interests and assets committed to their custody and, not infrequently, to their control, but if sound, its importance is sufficiently great to entitle it to receive the sanction of this court in order that it may be unquestionably enforced by the courts which are required to follow the rules of law laid down or affirmed by this tribunal in such cases.

8. Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this honorable court, directed to the Court of Appeals of the District of Columbia, requiring said court to certify and send to this court, upon a day certain to be therein designated, a full and complete transcript of the proceedings of said Court of Appeals in said case therein entitled "John Lewis Smith and Edwin L. Wilson, appellants, vs. E. Hilton Jackson, receiver of the First Co-operative Building Association of Georgetown, D. C., appellee," to the end that the case may be reviewed and determined by this court.

And your petitioner ever will pray, etc.

E. HILTON JACKSON,
Petitioner,

By W. W. MILLAN,
His Attorney.

To Mr. Louis A. Dent, Attorney for John Lewis Smith and Edwin L. Wilson, Appellants:

Please take notice that the foregoing petition will be presented to the Supreme Court of the United States on Monday, October 6, 1919, at the opening of court, or as soon thereafter as counsel can be heard.

W. W. MILLAN,
Attorney for E. Hilton Jackson, Receiver of the First Co-operative Building Association of Georgetown, D. C., Petitioner.

Service of copy of the above notice and of the petition accepted this — day of June, 1919.

LOUIS A. DENT,
Attorney for John Lewis Smith and Edwin L. Wilson.

Office Supreme Court, U. S.
FILED
SEP 23 1920
JAMES D. MAHER,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. [redacted]180

E. HILTON JACKSON, Executor of the First Co-operative Building Association of Georgetown, D. C., Petitioner,

vs.

JOHN LEWIS SMITH and EDWIN L. WILSON.

REPLY FOR PETITIONER.

W. W. MILLAN,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 419.

E. HILTON JACKSON, RECEIVER OF THE FIRST CO-OPERATIVE BUILDING ASSOCIATION OF GEORGETOWN, D. C., PETITIONER,

vs.

JOHN LEWIS SMITH AND EDWIN L. WILSON.

BRIEF FOR PETITIONER.

Statement of Facts.

This is a writ of certiorari from a decree of the court below, reversing, with costs against petitioner, a decree of the Supreme Court of the District of Columbia by which petitioner was awarded, against the respondents here, the sum of $743.68, with interest and costs.

By an order of the Supreme Court of the District of Columbia, passed on the 28th day of June, 1915, in a certain cause in equity, numbered 27845 and entitled Cora Ball et al., complainants, vs. First Co-operative Building Association of Georgetown, D. C., then pending in said court, peti-

tioner was appointed receiver of said building association in the place and stead of one William E. Ambrose, who had been appointed such receiver by said court on July 11, 1908, and had served as such until petitioner's said appointment, when his resignation was accepted. The bill in said cause was filed by certain stockholders of said building association and prayed for an injunction, dissolution, and the appointment of a receiver.

When said suit was instituted the building association was the holder of divers debts due to it from sundry of its stockholders to whom it had made loans secured by deeds of trust upon real estate, which debts passed to said Ambrose as such receiver upon his appointment. One of these was a debt of $2,700.00, secured by a deed of trust to one Jesse H. Wilson and one Raphael A. Casilear as trustees. Payments on said debt being in default, Ambrose caused the property covered by the deed of trust securing it to be advertised for sale at public auction on June 16, 1910, by Casilear, surviving trustee, the trustee Wilson being dead. The highest bid, $350.00, was made by Edwin L. Wilson, a member of the bar of said court. The property was withdrawn by the trustee on the ground that the bid was inadequate. On the same day the receiver Ambrose, with Edwin L. Wilson and respondent John Lewis Smith, also a member of the bar of said court and at the time counsel for receiver Ambrose, entered into an arrangement by which it was agreed that if Wilson would bid on the property when it should be again offered for sale, Ambrose and Smith would take interests in the purchase jointly with him if he should become the purchaser. As a result of this agreement Ambrose, on the following day, caused the property to be again advertised for sale by public auction, on June 28, 1910. On that date Wilson became the purchaser for his bid of $491.00, which was the highest, after some competition.

About eight days after this auction sale, and before the purchase price had been paid, a sale of said property for

$1,400.00 was effected by real estate brokers employed by Smith, acting for Ambrose, Wilson and himself, and the net profit was divided equally among the three, namely, Ambrose, the receiver; Smith, his attorney, and Wilson, the ostensible purchaser. When the transaction was ready for closing Casilear made a deed to Wilson, and Wilson, in turn, made a deed to the purchaser at the $1,400.00 sale, who was a Mr. Kite. These deeds were recorded simultaneously and Mr. Wilson never paid any money. The purchaser, Kite, duly paid the $1,400.00 due from him. There was nothing paid to the receiver, the taxes and tax liens, which took precedence over the deed of trust securing his claim, being in excess of Wilson's bid and he, Wilson, having voluntarily raised it $59.00 in order to satisfy the taxes and tax liens.

Petitioner became apprised of the foregoing facts after entering upon his duties as receiver and reported them, in substance, to the Supreme Court of the District of Columbia on January 28, 1916. By a further report filed December 1, 1916, he informed the court that after various negotiations, Smith and Wilson had proposed to him to submit to arbitration the claim which he had made upon them for the whole of the profits of the sale to Kite. The accounts of Ambrose, receiver, which had been referred in the meantime to a special master, had already been surcharged with the whole of said profits, but he had not, nor has he yet, paid the same. The court declined to submit the claim to an arbitrator or arbitrators with final authority, but, by consent of counsel for Smith and Wilson, referred it to a special master by an order passed December 8, 1916, directing him to report his findings of fact and conclusions of law, but reserving to the court the right to review such findings and conclusions on exceptions filed by either party (Rec., p. 4).

Petitioner took no testimony upon this reference, but rested upon the record and the testimony of the respondents (Rec., pp. 44-62). The facts are concisely stated in the

report of the special master (Rec., pp. 5-11), adopted by the trial court (Rec., p. 12), and are not disputed.

The special master found in favor of Smith and Wilson (Rec., pp. 5-11), but, upon exceptions filed by petitioner. (Rec. p. 12), on the ground that the master had erred in his application of the law to the admitted facts, the court reversed him in that particular, and, on the first day of February, 1918, passed a decree holding Smith and Wilson liable to petitioner for the whole of said profits (Rec., pp. 12 and 35).

Smith and Wilson appealed from this decree to the Court of Appeals of the District of Columbia, which reversed it. (Rec., pp. 75-79). Thereupon the petitioner brought the case here upon writ of certiorari granted by this court (Rec., p. 80).

Assignment of Errors.

The court below erred:

I. In holding that there was no theory apparent upon which a judgment against the appellants (respondents here) could be based and in reversing, on the merits of the case, the decree of the trial court (Rec., pp. 78-79).

II. In failing and refusing to hold upon the undisputed facts recited in its own opinion (Rec., pp. 75-76) that the respondents are liable to petitioner, and to affirm the decree of the trial court.

Points and Authorities.

What the case is: Succinctly stated, the single ultimate proposition that this court is asked to pass upon is as follows:

A member of the bar of the Supreme Court of the District of Columbia appointed receiver of a bankrupt building and loan association by said court entered into a secret agreement with two other members of said bar whereby, and in

pursuance of which, one of the two purchased in his own name, but for the use and benefit of the three men, certain real property covered by a deed of trust to secure a loan made by said association. The purchase was at a foreclosure sale, by public auction, ordered by the receiver and conducted by the surviving trustee under the deed of trust. The price bid for the property was less than one-fifth of the amount of the debt secured. Eight days after the foreclosure sale (Rec., p. 57), through the efforts of two, or possibly all three, of the parties to the agreement (Rec., pp. 44, 46, 48), the property was sold at nearly three times the bid upon which it was knocked down at the auction sale, and the profit thus realized was divided equally among the three, neither of whom paid any money to anybody, the settlement being made out of the $1,400.00 paid by the final purchaser. Can the receiver's attorney, respondent Smith, and a third party having knowledge of the facts, respondent Wilson, lawfully participate in this profit? In other words, can a receiver or other fiduciary lawfully traffic, to his own profit, in interests and assets committed to his custody and control, and can his counsel or third parties lawfully participate with him in the profits of such trafficking? We think this honorable court has emphatically answered that question in the negative in the very recent case of Magruder *vs.* Drury, 235 U. S., 106.

The accounts of the receiver have already been surcharged with the whole of them and that action has become final.

What the case is not: This is not a case where a debtor who has pledged his property by deed of trust or mortgage, to secure his indebtedness, complains that such deed of trust or mortgage has been unfairly, fraudulently, irregularly, or unlawfully foreclosed. It is a complaint on behalf of creditors that a fiduciary intrusted with assets belonging to them has unlawfully made a profit for himself out of them and that the respondents here have shared in that profit.

The Court of Appeals, erroneously we think, attempted

to adapt to this case its own reasoning in two of its previous decisions; Insurance Company *vs.* Barker, 17 App. D. C., 205, and Anderson *vs.* White, 2 App. D. C., 408, and of this court in Smith *vs.* Black, 115 U. S., 308. All of these were cases of a character that this case is stated above *not* to be. They were cases where the creditor who had pledged his property by deed of trust to secure his debt attacked the regularity of the foreclosure sale. The liability of respondents in this case arises out of the fact that they assisted the former receiver in doing a thing that he could not lawfully do.

> "A party who concerts or unites with a fiduciary in any act contrary to the duty of such fiduciary becomes *particeps criminis* and will be held liable accordingly."
>
> Woodell *vs.* Bruff's Heirs, 25 W. Va., 465.

The naked proposition in this case, not passed upon or even noted by the court below, is that a receiver, in the name of another, purchased property for himself when he was having it sold for the real owner, his *cestui que trust*, and then, still in the name of another, sold it for his own profit. His duty as a receiver was to make it bring as much as possible. His interest as a purchaser was to buy it as low as possible.

The law will not allow him to put himself in a position where his duty and his interest conflict.

> Hayes *vs.* Hall, 188 Mass., 510.
> Enslen *vs.* Allen, 160 Ala., 529.
> Johnston *vs.* Little, 141 Ala., 382.

The court below justified the action of the receiver, Ambrose, and of the respondents, on the ground that the receiver had no positive duties to perform in connection with the foreclosure sale after requesting the surviving trustee under the deed of trust to sell, and that the test was whether such surviving trustee proceeded regularly. They thus

missed the point of petitioner's contention and the real point of the case. Their reasoning as to the character and effect of the sale is conclusively met by that of the learned trial justice:

> "It will be observed that the lot was encumbered for more than its value. The debt secured by the trust was $2,700.00 and the tax incumbrances amounted to more than $550.00, while the sale to Kite, which both sides treat as an excellent one, was for $1,400.00 only. So that it is plain that the sale ordered by the receiver was merely an attempt to realize something for the building association. There was no possibility of a surplus to be paid to the owner of the equity. It was in substance, a sale of property belonging to the association, as much so as if the whole title had belonged to the association. The sale was made by the receiver as representing the association which had a right to require the trustee to sell. Whether the association itself would have been entitled to bid on the property if it had been doing business at the time, is not the question. Whether the receiver, if he had been so authorized by the court, might properly have bid upon the property in the interest of the association is not the question. Neither of these things happened. What happened was that the receiver, jointly with Smith and Wilson, bid for the property for their own private interest. That is to say, the receiver, in the name of another, purchased this property for himself at the same time that he was having it sold through the holder of the legal title, for the real owner, the association which he represented * * *. And, moreover he was a secret purchaser bidding in the name of another."

It is submitted that the true situation was, in effect, that the Building Association was a mortgagee and had been succeeded in interest, as such, by the receiver as a fiduciary for its stockholders, and that the trustee making the sale was the mortgagee's agent to foreclose and as such under the direction, in legal contemplation, of the fiduciary (mortgagee),

as he was in fact in this case (Rec., p. 59, testimony of Respondent Smith).

Indeed, the said Court of Appeals has itself held in Kraak *vs.* Marshall, 23 App. D. C., 129, that such a trustee is "No more than an agent of the mortgagor and mortgagee or *cestui que trust* to carry into effect the contract between them, for which purpose, and only for which purpose, he is vested with the legal title," and in Hitz *vs.* Jenks, 16 App. D. C., 530, the same court said that a deed of trust is the modern form of mortgage.

So we have here the case of the active representative of the mortgagee, Receiver Ambrose, who sets in motion its agent to foreclose, using the foreclosure sale for his own profit and the respondents here participating in such profit.

Jurisdiction.

It is to be observed that the issue between the contending parties here was raised by referring the controversy, which had been brought to the trial court's attention by the report of the receiver, without pleadings, to a master, with instructions to report upon the law and the facts. The omission of pleadings was waived by the consent to the reference. After the trial court had filed an opinion (Rec., p. 12) sustaining the exceptions of the petitioner as above stated, respondents filed a motion to strike out petitioner's exceptions, vacate the reference, dismiss his petition (there was no petition), and deny a decree on the grounds of lack of jurisdiction and estoppel.

A second opinion was filed by the trial court (Rec., p. 27) effectively disposing of these contentions, holding, among other things, that the objection to the jurisdiction had not been seasonably made, and these questions were not considered by the Court of Appeals. Petitioner relies upon the authorities cited by the trial court in its second opinion (Rec., pp. 28-33) if said contentions be considered as open here.

That in a suit in equity for the administration of an insolvent concern by a receiver, the receiver may so conduct himself as to justify his being made a party defendant, and that those who unite with him in the violation of his duty towards the trust estate may be brought in as defendants and required to account in that suit, was held in Harrigan *vs.* Gilchrist, 121 Wis., 127, where the whole law of the subject was examined, both upon principle and authority, in the nearly one hundred pages from 207 to 303.

Conclusion.

It is respectfully submitted that the decision of the Court of Appeals is contrary to long-established and well-recognized principles, and that their decree should be reversed and the decree of the trial court affirmed.

W. W. MILLAN,
Attorney for Petitioner.

In the

Supreme Court of The United [redacted]

OCTOBER TERM, [redacted]

No. [redacted]180

[redacted]

vs.

[redacted]

In The

Supreme Court of The United States

OCTOBER TERM, 1918.

No. 419

E. HILTON JACKSON, Receiver of the First Co-Operative Building Association of Georgetown, D. C., Petitioner,

VS.

JOHN LEWIS SMITH and EDWIN L. WILSON.

MEMORANDUM FOR RESPONDENTS

The sole question presented by the petition for a writ of certiorari herein is whether the case is one of such "gravity and general importance" as to be brought within the purview of the decisions of this Court; decisions requiring no citation.

The attempt has been made in the petition, as in the briefs and arguments before the Court of Appeals and the Supreme Court of the District of Columbia, to make it appear that a Receiver, a member of the Bar of these Courts, acted improperly and fraudulently in

the execution of his trust, notwithstanding in the very initiation of the case any charge of actual fraud was disclaimed; and so on the theory that the said Receiver in fact acted fraudulently, notwithstanding the disclaimer, to hold him, and therefore these respondents, who were associated with him in the act complained of, on the purely technical ground of a constructive trust.

The Special Master reviewed carefully all of the facts of the case (Transcript of Record, pp. 6-10); noted the disclaimer of actual fraud (Transcript of Record, p. 9); and decided that as matter of law these respondents should not be held (Transcript of Record, p. 12). The trial Justice of the Supreme Court confirmed the findings of fact (Transcript of Record, p. 13); and held these respondents guiltless of wrongdoing (Transcript of Record, p. 21); but reversed the Master's conclusion of law, upon the theory, **contrary to the findings of fact,** that the said Receiver was in effect both selling and buying his trust property, although the sale was conducted by an independent trustee under the terms of a deed of trust, and the Receiver had no interest in the property itself (Transcript of Record, pp. 17, 33). The Court of Appeals in its opinion reviewed the facts fully, unquestioned as they were, repudiated the theory of the trial court and reversed the decision of that Court. (Opinion of the Court of Appeals.)

The facts, summarized briefly, were that the Receiver, representing a creditor building association in liquidation, called on the trustee under a deed of trust securing the debt to the building association to make sale under his trust, which stood unreleased of record; that at the attempted sale, regularly advertised and conducted, by the trustee, the respondent Wilson was

the highest bidder, but the property was withdrawn because of inadequacy of the bid; that after the attempted sale the attorney of said Receiver, respondent Smith, openly, in the presence of the auctioneer, and because of the auctioneer's suggestion as to values, offered to go in with Wilson on the speculation if Wilson, acting on his own judgment, should become high bidder and purchaser at a subsequent sale, and the Receiver thereupon expressed his wish to join with them. The property was readvertised and sold by the trustee. Wilson was the high bidder and purchaser at the sale, and he and Smith and the Receiver divided a profit on a later private sale. The sale by the trustee was regular and fair in every respect and was not influenced or interfered with by either Smith or the Receiver, in any manner whatsoever. The full relation and acts of the three parties were limited to and in pursuance of the casual conversation at the attempted sale as above outlined.

The first incorrect statement of the petition requiring notice (p. 4) is that the Court of Appeals ignored the theory of the claim against these respondents. The transcript of record, the briefs of counsel, and the opinion of that Court show that the theory was fairly presented and fairly met and that the Court clearly considered and disposed of it.

The next misstatement in the petition (p. 5) is that the agreement as to this purchase was "secret." This is unquestionably contrary to the conceded fact. The agreement made was openly made, as stated, in the presence of the auctioneer (Transcript of Record, p. 7). This same misstatement also unjustifiably implies that there was actually a precedent agreement to make a joint purchase, when, in fact, the agreement

was, as already stated, that **if Wilson should become the purchaser** (presumably at a figure which would make the speculation appear a good one having in view the advice of the auctioneer), the respondents would then participate with him in the venture. Wilson was to purchase solely for himself and on his own judgment. It was only in the event Wilson became the purchaser that these respondents were to be allowed by him to share in **his venture.** (Transcript of Record, p. 7.)

The next misstatement in the petition (p. 5) is that the Receiver **ordered** the sale. The Master found he **requested** it. (Transcript of Record, p. 7.) As pointed out in the opinion of the Court of Appeals, and in the brief of counsel for respondents, the Receiver of the Creditor could not order or control the sale. His only duty was to request it. The trustee under the deed of trust had exclusive power and control and could not be interfered with. (Brief for Respondents, pp. 22, 56-8; Opinion Court of Appeals.)

The next suggestion of the petition to be noticed (p. 5) is that the price at which the property was sold to Wilson was inadequate **because it was but one-fifth of the loan.** The Court is not apprised as it should be in this connection, and as pointed out in the brief of counsel for respondents, that the loan had been running eleven (11) years and presumably had been reduced by payments; and that there never was any actual evidence in the case as to the debt secured, and therefore no evidence as to the extent of the interest of the Receiver as such, or whether he had any interest at all. The fact affirmatively appeared that he was merely proceeding under an unreleased trust. (Brief for Respondents, p. 65.) The Court of Appeals distinctly held, following the Master, that there was no

inadequacy of price. (Opinion of Court of Appeals.)

The statement of the petition (p. 5) that the rule laid down by the Court of Appeals in this case is contrary to the decisions of this Court and of all other Courts, is wholly unsupported by authority. On the contrary, as pointed out by the Court of Appeals in its opinion and in the citations of authority in the brief of counsel for respondents, the decision of the Court of Appeals is in complete harmony with the decisions of this Court and all other Courts. It is in harmony with the rule that a fiduciary may purchase the property of his co-relate at a sale by a third person not procured by him or controlled by him, a rule applied universally to judicial sales, and, in some of the authorities cited, to sales by a trustee under a power in a trust. (Brief for respondents, pp. 58-62.) So that, conceding for purposes of argument, a fiduciary relation of the Receiver to the property sold, though such relation would only exist as to any net proceeds of the sale in the hands of the trustee, **applicable to an ascertained debt,** this rule, if applied, permitted the Receiver's purchase. It should be noted in this connection that the trial Court was of the opinion that the Receiver only could not purchase, but held respondents because associated with him in the venture. (Transcript of Record, p. 17.) The decision is also in harmony with the rule that an attorney for an execution creditor can purchase at the execution sale, provided it is not to the prejudice of his clients. (Brief for Respondents, p. 61.) In this case Smith was one of the attorneys for Ambrose, the Receiver of the creditor, and the sale was in effect a foreclosure sale at the Receiver's request. The analogy and the reasoning unquestionably apply under the theory of the rule above

cited—the control of the sale by a third party and the absence of prejudicial fraud. The Court of Appeals in its opinion stated that it did not appear that the rights of the creditor were prejudiced by the action of the Receiver, and the owner of the equity of redemption neither complains nor is a party.

The foregoing rules are well settled, and to say that the decision of the Court of Appeals applying them tends to encourage trafficking by fiduciaries in their trusts is going far beyond the limits of propriety in characterizing that decision. The difficulty which respondents have had to meet throughout this case has been the disingenuous attempt at every step to color it with an atmosphere of actual fraud, notwithstanding a specific disclaimer of any charge of actual fraud, and by so doing to secure the improper application of the technical rule of a constructive trust on the assumption of the very fraud disclaimed, when the rule of a constructive trust has no application on the facts found. The same attempt is now made in the petition to this Court, in an endeavor to obtain the intervention of this Court by the exercise of its extraordinary jurisdiction, through the apparent suggestion or insinuation that the morals of the whole legal profession are endangered by the example of a great fraud sanctioned by an Appellate Court, though on the unquestioned findings of fact by a Master and two Courts the fraud never could have existed.

It is believed by counsel for respondents, as will appear from the brief in the Court of Appeals, that the whole proceeding in the trial Court was justly upturned by the Court of Appeals. The reputation and high professional standing of the respondents entitled them to the prompt repudiation of the sophistical

theories adopted for their discomfiture, particularly as their submission of the matter to what was, in legal effect, an arbitration, and their waiver of substantial legal defenses, imposed upon the Receiver the good faith obligation to adhere to the finding of the Master, and called for the trial court's acquiescence therein, unless the conscience of the Court was shocked by evidence either of actual fraud or of the sacrifice of the rights of the Building Association or the owner of the equity of redemption, all of which are absent from the case.

Respectfully submitted.

LOUIS A. DENT,
Attorney for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 419.

E. HILTON JACKSON, Receiver of the First Co-Operative Building Association of Georgetown, D. C.,
Petitioner,

vs.

JOHN LEWIS SMITH and EDWIN L. WILSON,
Respondents.

OR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

In view of the incompleteness of the Statement of Facts in the brief for petitioner, counsel for respondents deems it necessary to set forth more comprehensively a statement of the facts of the case, particularly of the litigation in which the transaction in question herein was involved as well as the status of the parties now before the court in relation thereto, all important in view of the jurisdictional questions raised in the trial court, and collateral to the question of the merits.

STATEMENT OF THE CASE.

This is a hearing on a writ of certiorari to the Court of Appeals of the District of Columbia, bringing up for review an order of that Court reversing a decree of the Supreme Court of the District of Columbia, in Equity Cause No. 27,845, entitled Cora Ball, et als., complainants, vs. First Co-operative Building Association of Georgetown, D. C., which said decree so reversed had, while affirming findings of facts, overruled, on exceptions (R., 12), the conclusion of law (R., 12-20) of Adolph A. Hoehling, Esq., Special Master, and awarded a money recovery in favor of E. Hilton Jackson, receiver of said Building Association, appointed in said cause, the petitioner before this court, against John Lewis Smith and Edwin L. Wilson, respondents here, who were not parties to said cause, the said decree being predicated solely on an order (R., 4-5), consented to by the then counsel for respondents, referring to said Special Master the claim of said Receiver against respondents as set out in said Receiver's ex parte reports to the Court (R., 2, 3), treated by the court under the consent order as a petition of Receiver without other pleading (R., 32, 34-5). Upon the rendering of the opinion of the trial court precedent to its said decree, a motion was filed (R., 20) to strike the exceptions, deny a decree and dismiss Receiver's petition (treating his report as such), on two grounds:

1. Because the court was without jurisdiction in said cause to hear and determine the said claim of said Receiver, or any claim of said Receiver, against respondents (R., 20).

2. Because the submission by respondents to the consideration of said claim by a Special Master was secured by said Receiver through an agreement on his part that

he would accept the report of the said Special Master as final, in consideration of respondents abiding by and performing under the same without regard to any right on their part to object to the jurisdiction of the court; which agreement had been violated by said Receiver (R., 20).

The said motion was overruled (R., 27-35) and the decree which was subsequently reversed was entered (R., 35-6). Exceptions to said decree were duly allowed and the appeal of respondents noted (R., 36-7). The Assignment of Errors was then filed (R., 38-9), and also the statement of evidence (R., 40-74). On appeal the decree was reversed (R., 75-79); and thereafter the writ of certiorari issued from this honorable court (R., 80) and the certified copy of the record came up as the return to the writ (R., 80-1).

FACTS OF THE CASE.

The bill in the aforementioned equity cause was filed in June, 1908, by four stockholders of defendant corporation, for injunction, dissolution and receiver. It alleged that the First Co-operative Building Association of Georgetown, D. C., defendant, was a joint company or partnership conducting a business called a building association; and that the plaintiffs were unable to ascertain the names of the persons who were members of the association. Coincident with the filing of the bill, the records of the association were found to be missing, including the books containing the record of stockholders, and J. Barton Miller, Secretary, was accused of removing and secreting them (R. 40-1, 42-3), for which and for embezzlement he was afterwards indicted and tried (D. C. Appeals 38 p. 361; 41 p. 52). Other stockholders, to the number of 25, intervened, and one of the directors of the association answered, adopting the intervening peti-

tions, making in all 30 stockholders plaintiffs. The remaining directors and officers answered, alleging that the records of the association were missing, that Miller had refused to return the same and that they, therefore, could not give detailed statements of the affairs of the association, of which there were about 600 members (R., 40).

In July, 1908, Ambrose was appointed receiver, and qualified with a bond of $50,000 and the American Bonding Company, as surety (R., 41). He immediately thereafter, under authority of the Court, employed Messrs. James S. Easby-Smith and John Lewis Smith as his attorneys (R., 42). Every effort was subsequently made by the Receiver and his counsel, for nearly two years, to locate and recover the association records, by means of a rule on Miller in said cause, an equity suit against Miller for discovery, a search warrant, and the employment of detectives, all without avail (R., 41, 42-3). In the absence of these records, the Receiver's counsel examined the Land Records of the District to discover borrowing stockholders whose trusts were not released (R., 41, 43). The Receiver advertised in the Star, calling on stockholders to submit their individual passbooks to him. In answer to this advertisement he obtained a list of but 441 stockholders out of 602, the number reported at the annual meeting four days before the filing of the bill in this cause; and some of these 441 produced no books, claiming they had left them with Miller (R., 41-43).

From time to time up to 1911, when his activities ceased, the Receiver, as the result of the information obtained from the land records, reported collections from sales of real estate, loans to stockholders, and foreclosures (R., 41). Among the supposed debtors of the Association, disclosed by the examination of the Land Records, was one Frederick S. Schwab, who, to secure a

debt of $2,700.00, executed his deed of trust, dated *August 10, 1899* (recorded in Liber 2420, at folio 245 of the Land Records of the District of Columbia), conveying Lot 7 in Square 41, in the city of Washington, to Jesse H. Wilson (afterwards deceased) and Raphael A. Casilear, as Trustees (R., 6). The Receiver, Ambrose, requested the surviving Trustee, Casilear, to advertise and sell this property under the deed of trust, and the Trustee thereupon advertised the property for sale on June 16, 1910 (R., 6).

On the day of sale the property was knocked down to respondent Wilson on his bid of $350, which was at the rate of 4½ cents per square foot, but the property was withdrawn by the said Trustee Casilear on the ground that the bid was inadequate (R., 6, 9). Immediately, thereafter, the auctioneer (Mr. Weschler), Ambrose, Smith and Wilson walked down the street together; the auctioneer remarked that any property in Washington that could be bought for 10 cents a foot or under was cheap property; Smith said to Wilson that if the latter wanted to bid again he (Smith) would be willing to take an interest in the property if Wilson should be the highest bidder; Ambrose stated he would go in, too, in the event Wilson should become the purchaser at a second sale. The understanding was, further, that Wilson should use his own judgment in bidding at all and as to the amount of his bid, and if he should happen to become the purchaser the three, Ambrose, Smith and Wilson, were to be jointly liable on the purchase and jointly interested in the property itself (R. 6).

The following day, June 17, 1910, the property was again advertised for sale at public auction. Aside from the general, informal, and rather indefinite arrangement above set out as to the possible purchase of the property

by Wilson at a second sale, as the joint enterprise of the three persons named, there was no conference or any concerted plan of action between Wilson, Smith and Ambrose (R., 6-7). At the second sale, June 28, 1910, Wilson, in competition with one or more bidders, finally made a bid of $491, or at the rate of 6½ cents per square foot for the property, and it was knocked down to him at that figure (R., 7, 9). His bid was made in the exercise of his individual judgment, without any previous conference with respondents, he having in mind, however, what the auctioneer had theretofore stated about city property at 10 cents a foot or under being cheap property (R., 7, 9). Ambrose and Smith were both present at the second sale (R., 7). Neither of them had any duty in relation to the sale, or any of the sales of real estate made by trustees under these trusts (R., 5, 6, 7). Neither of them participated therein in any way, either in the conduct of the sale or in the acceptance of the bid of Wilson, or by the giving of instructions or directions to the auctioneer, Weschler, or Trustee Casilear (R., 7, 9, 10). The Auctioneer's testimony was that the ordinary course at such sales is for him to take final instructions from the Trustee; but becaues of lapse of time he had no definite recollection as to this particular case (R., 7). There is no evidence of any improper influence exerted by anyone at this sale to prevent competition, or to close the competitive bidding, or to bring about the sale to Wilson in preference to any one else or at any particular price or figure. On the contrary, the sale was fairly conducted on competitive bidding (R., 9).

A day or two after the sale Smith communicated with one or more real estate men about the property, and thereafter, on July 6, 1910, Allen E. Walker & Co., real estate agents and clients of Smith, procured Harry A.

Kite as a purchaser of said property for fourteen hundred dollars ($1,400.00), all cash, and the contract of purchase was approved and signed by Wilson. Later it developed the property had been sold for taxes and deeded to Charles H. Wiltsie, and that it would require five hundred and fifty dollars ($550.00), as per compromise arranged with Wiltsie, to clear the property; whereupon Wilson agreed to advance his purchase price the fifty-nine dollars ($59.00) over and above his bid, necessary to clear the property and give a good title to Kite. Casilear, trustee, conveyed to Wilson by deed dated July 30, and Wilson conveyed to Kite by deed dated August 12, both recorded August 25, 1910 (R. 7, 8). Wilson's net profit was equally divided among the three persons named, Ambrose, Smith and himself (R., 8). The check to him from the Title Company bore the endorsements of Ambrose and Smith (R., 45, 47, 52, 58).

In June, 1914, the Receiver Ambrose, filed his report under Rule 73, and an account showing a net balance for which he was accountable of $33,889.39, which sum was supplied for him by his surety with which to account (R., 41, 73). The auditor, under proper reference, was directed to state this account *and the distribution of the fund* (R., 42). Irregularities were discovered in the account by the Auditor, who examined the Receiver with respect to the same (R., 42). The Receiver thereafter, in May, 1915, tendered his resignation, and in June, on petition of creditors setting up the necessity of proceeding against his surety and the advantage of continuing the cause before the Auditor (Mr. Dent), who was about to leave office, as a Special Master, the resignation of the Receiver (Ambrose) was accepted, the present Receiver (Jackson) was appointed, and the cause was continued before Mr. Dent as a Special Master. In July the former

Receiver was directed to turn over to the substituted Receiver the balance in his hands (R., 43).

In the meantime there were pending before the Auditor and Special Master, two claims by former officers and directors of the building association, as creditors, on account of payments they had made of notes of the association on which they were accommodation parties; one of Brown for $25,000 principal, established by decree in equity cause No. 30,340, and the other of Freeman, et als., for $10,000 principal asserted by petition in the dissolution suit (R., 42). On account of the Brown claim the former Receiver had paid by order of court $15,000, after which he turned over to the present Receiver the sum of $19, 348.80, the balance in bank to his credit as Receiver (R., 42, 43).

The Special Master filed his report December 6, 1915. He surcharged Ambrose $17,011.63 principal, together with $14,902.63 interest; and found in favor of the Freeman, et als., claim subject to the priority of the Brown claim (R., 43). In concluding his report, the Master said:

> "No distribution is stated at this time. If restitution is made by the surety on the former receiver's bond sufficient to cover the defalcation, even exclusive of interest, there will be sufficient to provide for all expenses of the receivership and payment of the claims on the two notes in controversy according to the findings of this report if ratified by the court. If thereafter there should be a surplus *no distribution could in any event be stated without proof of the stockholdings, as to which there is no evidence in the case*" (R., 43).

One of the items of surcharge against Ambrose in the account of Special Master Dent was the item of net

profits to respondents on the resale of the Schwab lot. Special Master Hoehling concluded that this surcharge was made "evidently upon the theory that the Receiver could not be allowed to make a profit in connection with any matters embraced within the receivership" (R., 8). There is nothing to show any findings or conclusions by Special Master Dent, or upon what theory he made the surcharge. In his schedule of surcharges he ignored the sale to Wilson and treated the net proceeds of the re-sale by Wilson as chargeable against Ambrose (R., 43-4). All of the facts with respect to the transaction were brought out before the Special Master by the Receiver, who summoned Messrs. Smith and Wilson to testify (R., 44).

It was apparent that the funds available to the Receiver, if he should collect from the surety on the bond of Ambrose the full amount of the penalty of the bond, would not substantially exceed the claims of the creditors Brown and Freeman, et als., should the finding of the Special Master allowing the claim of Freeman, et als., be sustained by the Court, a fact commented on by the Receiver in his report of February 4, 1916, in which he said that the court's action on this finding would

> "result in a decree awarding practically the entire funds in the hands of the Receiver to preferred creditors of the association, or, on the other hand, in a decree, leaving intact a substantial part of said funds for distribution among the stockholders" (R., 72).

In this situation the Receiver undertook negotiations with the surety on the Ambrose bond (R., 73). He also undertook, in his reports of January 28 and February 4, 1916, to present to the court the questions with which he claimed it his duty to deal. Two of these, like the mat-

ter of recovery from the surety, were of grave importance (R., 73) viz.:

1. The advisability of action against the directors of the Building Association, for the defalcations of Miller.
2. The advisability of action against the banks in which Ambrose deposited, for the conversion of the trust funds.

The other was the *minor one* here now on appeal (R., 1-2). In connection with these matters the Receiver obtained Feb. 8, 1916, an order authorizing him to employ counsel (R., 73).

Three days later, February 11, 1916, the Receiver reported an *offer* of the surety of Ambrose to pay in settlement of its liability the amount of the difference between its former payment and the penalty of the bond, viz.: $16,110.91, and the court authorized its acceptance February 16, 1916. This made up the entire principal of the defalcation of Ambrose, except $901.09 (R., 43, 73). Seven days thereafter the Receiver secured an order excusing him from proceeding against the directors of the Building Association (R., 73). On the same day, February 18, 1916, the court confirmed the report of Special Master Dent, and directed the funds to be applied in the settlement of the claims of the creditors. The Special Master thereupon, February 23, 1916, stated a supplemental account, showing, after debiting the Receiver with the amount received from the bonding company and after distribution to the creditors and deduction of the allowances to the Receiver and his counsel, a balance of funds of the Building Association in the hands of the Receiver of $1,746.56. On further accounting in the spring of 1916, and after further allowances to the Re-

ceiver and Counsel, this balance was reduced to $98.19 (R., 73).

The activities of the present Receiver here ceased until towards the end of the year. On December 8, 1916, he secured an order disposing of the only remaining matter of magnitude by excusing him from proceeding against the banks for conversion of Ambrose's deposits (R., 73).

With all consequential matters disposed of, with the assets of the defunct corporation exhausted, with the beneficial owners of the trifling balance of money unascertainable, the Receiver, pressing his minor claim against Messrs. Smith and Wilson, finally secured from them and submitted to the court, December 1, 1916, with favorable comment, an offer of arbitration, November 22, 1916 (R., 3-4), and he agreed with their counsel to arbitration or conclusive findings as a Special Master by Mr. Hoehling (R., 21, 23). The court, however, objected to yielding its right to review the report of a Special Master, and in signing the order of reference, December 8, 1916, reserved that right and the rights of parties to file exceptions (R., 21, 23, 24). Notwithstanding this reservation, it was understood between counsel that the agreement not to file exceptions to the report of the Special Master would be abided by (R., 22, 23). Contrary to this agreement, however, exceptions were subsequently filed by the Receiver's counsel (R., 12).

Coincident with this submission of the proposition of arbitration of the claim against Messrs. Smith and Wilson, the Receiver, December 1, 1916, asked authority to proceed against Ambrose for the balance due on the Special Master's account, $15,080.65, which sum was all interest accrued and accruing on his defalcations, except $901.02 as hereinbefore set out; and this was granted in the same order, December 8, excusing him from proceed-

ing against the banks, and on the same date as the reference of the claim against Smith and Wilson to Special Master Hoehling (R., 4, 73). Subsequently, the Receiver filed a petition in the cause against Ambrose, and the latter voluntarily appearing and by answer submitting his interests to the court, a decree was entered against him, to operate as a judgment at law, for the entire balance of principal and interest found against him by the Special Master on general accounting, including the item here in question, amounting to $16,894.05 (R., 73, 74).

Pending decision on the exceptions to Special Master Hoehling's report, the court passed, August 27, 1917, an order approving the last account of the Receiver, which showed the balance in his hands, after further allowances, to be $322.11, subsequently reduced to $265.86 by the payment of the bill of the stenographer reporting the testimony before Special Master Hoehling. This order provided that the allowances therein made to attorneys for the Receiver should be in full for all services to date, *except as to two matters mentioned in the bill of said attorneys attached to said report, being the matter of the decree against Ambrose and the claim against Smith and Wilson, as to which matters the order reserved the question of further allowance to said attorneys (R., 74).*

Later, on the handing down of the court's opinion on the matter of the claim against Smith and Wilson, the motion to strike was filed and was denied according to the second opinion preceding the decree.

ARGUMENT.

The Merits of the Case.

Although the controversy involved in this case was only cognizable at law and not in equity, as will hereafter be shown; if it is to be determined in equity any conclusion reached must, in order to stand, rest upon the correct application of equitable principles and rules to the facts shown.

The Special Master found, as matter of fact, that not only was there no actual fraud in the sale (R., 7, 9, 10), but that no actual fraud was alleged (R., 8). To the contrary, he found that the sale was fairly conducted, on competitive bidding; that no improper influence was exerted by anyone to affect it; that there was no participation by Smith or Ambrose in any way affecting its fairness or integrity (R., 7, 9). The trial court confirmed the findings of fact by the Special Master (R., 12), and exonerated respondents from any conscious wrongdoing (R., 20).

In his original submission to the trial court of the matter of his claim against Messrs. Smith and Wilson, January 28, 1916 (R., 2), the Receiver, commenting on the facts brought out by the testimony of Messrs Smith and Wilson before Special Master Dent, said:

> "That the arrangement referred to, resulting in the distribution stated of the profit made on account of the said sale, was manifestly an improper one, and, to the extent of the profit realized, constituted an unlawful profit out of trust funds, and, therefore, properly chargeable against the account of the said Ambrose by the Special Master, requires no demonstration."

Following this theory, counsel for the Receiver (petitioner here) before the Special Master claimed that because of the fact that Ambrose was Receiver of the property and assets of the First Co-operative Building Association and Smith was one of the attorneys for said Receiver, it was legally impossible for Wilson, even though an entire outsider, to have made any bargain or arrangement by which either or both Ambrose or Smith should be admitted to share in the property aforesaid, or in its proceeds, should he, Wilson, become the purchaser thereof at public sale; and that the profits realized from a joint enterprise entered into and engaged in by parties thus situated are, in equity, impressed wth a constructive trust in favor of the Receiver of the Building Association (R., 8, 9, 10, 11). The Special Master was not clear in his own mind whether the claim by the Receiver was that the parties to the joint enterprise should be charged jointly and severally to the extent of the entire net proceeds ($790.90), or severally to the extent of the profit realized by each; but he held that as to Ambrose the matter need not be considered, as his liability was fixed by the surcharging of his accounts with the entire net profit realized on the resale, leaving for determination only the question of the liability, if any, of the respondents. As to that he said (R., 11):

> "The undersigned has carefully considered the authorities submitted by counsel on both sides of this controversy, and has already made an independent examination of the authorities; and without here undertaking an analysis of the decided cases, it will probably suffice to say, for present purposes, that, so far as concerns Smith and Wilson, the persons sought to be charged herein, the situation is somewhat novel, and does not seem to be ruled by any of the authorities so submit-

ted, nor by any of the additional cases examined by the undersigned; and while the question itself cannot be said to be free from doubt, it would seem that, under the particular facts and circumstances of this case, no liability should be adjudged herein against either Smith or Wilson in any sum or amount on account of the transaction aforesaid; and that conclusion of law is accordingly hereby submitted to the court."

The trial court, considering and applying this same principle (R., 17, 32), overruled the Master's conclusion of law and sustained the exceptions (R.,12), holding that respondents were liable jointly and severally for the full amount (R., 19-20) not because they were prohibited from purchasing, but because they had entered into a joint speculation with Ambrose, who was by law forbidden to engage in it (R., 16).

The reference to the Master was a reference of the whole case by consent. Unless, therefore, there was manifest error in the conclusion of the Master, the court was wrong in overruling him. Every presumption of law must be resolved in favor of these respondents. Even in cases of actual fraud the presumption is in favor of the one charged.

Prevost vs. Gratz, 6 Wheat 491, 498; 5 L. Ed., 311, 315; which was a suit to establish a trust on an absolute sale between persons in confidential relations. The courts, all, in varying but universally strong language, base this rule on the seriousness of judicially branding a person with the badge of fraud; and they make no distinctions between actual and constructive fraud, for the distinction is not one of substance, so far as the remedy is concerned. A breach of duty is an actual fraud on the person against whom it operates, even though not intentional.

If there was any doubt, therefore, as to the application of the technical rule of constructive fraud, why should not that doubt have been resolved in favor of these respondents? The application otherwise should be too plain to be questioned. The Master states that he could find no authority in law for applying the rule; and in the absence of manifest error that conclusion was binding on the court. In Kimberly vs. Arms, 129 U. S., 512, 525; 32 L. Ed., 764, 769, Mr. Justice Field said that:

> "The determinations of a Master to whom the whole case has been referred by consent, are not subject to be set aside and be disregarded at the mere discretion of the court. They should be taken as presumptively correct, subject to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

Conclusions of a Master are not to be set aside or modified unless there clearly appears to have been error or mistake.

Boesch vs. Graff, 133 U. S., 697, 705; 33 L. Ed. 787, 791.

The reason clearly is, as intimated by Mr. Justice Field, that a reference of a whole case to a Master by consent of the parties, not otherwise being in the power of the court, is in the nature of an arbitration by rule of court. If, therefore, no manifest error was pointed out in the opinion of the trial court, an injustice was done to these appellants by the decree overruling the Master, and it was properly set aside by the Appellate Court without any other consideration. If an Appellate

Court is satisfied that on the whole case justice has not been done, or that the right to recovery is doubtful, that alone will be ground for setting aside a decree, be the error only slight:

> Sav., Fla. & Western R. Co. vs. Harrigan, 80 Ga., 602;
> Goldstein vs. White, 16 N. Y. Supp., 860;

or even where there is no error at all:

> Curley vs. Tomlinson, 5 Daly (N. Y.), 283.

Now a careful analysis of the opinion of the trial court will show that it points out no manifest error in the conclusion of the Master. The only case cited (R., 17) in which the situation of the parties was somewhat similar, is that of Hayes vs. Hall, 188 Mass., 510; but there the almost apparent inadequacy of price, the relationship of the parties, and the other circumstances of the case, were sufficient to raise a presumption of actual fraud. The other cases cited, and now relied upon in petitioner's brief, were plainly cases of a trustee *dealing with the property of his co-relate*, and inapplicable in this case. They are cases, of which the books are full, of a person occupying a fiduciary relation fraudulently acquiring the property of his *cestui que trust* or correlate, which is not this case, as will readily be seen.

In the face of this lack of case authority, my own examination of the law for the preparation of the brief and argument in the Court of Appeals was exhaustive, covering State as well as Federal decisions. As the result of that examination I, like the Master, have found no case in which the situation of the parties is exactly as here, or in which the situation of parties is similar,

except the single Massachusetts case above cited. There are many cases involving analogous situations and principles, which I will discuss later, one of which principles is that followed by the Appellate Court in this case in reversing the decree of the trial court; and all are opposed to the decision of the trial court. Beside, I find no case in which the rule of a constructive trust, as applied to a strict or well recognized fiduciary relation, has been technically applied. In every such trust sustained it has been on the ground of an indisputable breach by the fiduciary of a plain, certain, inflexible and unequivocal duty *while in a position to control a transaction from which real injury resulted*, or on the ground of actual fraud, or such inadequacy of price as coupled with other circumstances raised the presumption of actual fraud. Of the cases denying such trusts there are innumerable ones applying limitations or the rule of laches, even in face of the grossest fraud; while there are a few refusing to apply the principle technically, in the absence of fraud, though the fiduciary relation was unquestioned and the transaction was in the prohibited class.

One cannot after a comprehensive review of the law come to any other conclusion than that the rule of a constructive trust has never been applied technically in the absence of a clear fiduciary relation *to the property involved* and real injury or loss to the person owning it; that is never when the transaction is in effect *damnum absque injuria*. The same principle has apparently governed as in actions of deceit, that is that fraud and injury must concur to warrant relief. In Clarke vs. White, 12 Pet. 178, 196, 9 L. Ed. 1046, 1054, it was said that fraud and injury must concur to furnish ground for equity jurisdiction. This view was taken by the court

in a very well considered opinion reviewing the authorities, in Douglass vs. Blount (Texas), 58 L. R. A., 699. So also in Symmes vs. Union Trust Co., 60 Fed. 830, 865, in which the court said of a constructive trust sought to be maintained against directors: "It is not, however, so much the profit to themselves as it is the detriment to others, that furnishes the ground for setting the transaction aside." In Yuster vs. Keefe (Ind.), 90 N. E. 920, the court said, "constructive trusts are raised only in cases where necessary to prevent a failure of justice."

The failure of counsel, the Master and the trial court itself to find any application of the rule in such a case as this is almost conclusive, at this late day in the exploitation of case law, that there is no right upon which the remedy herein granted can be predicated. It is difficult to comprehend, therefore, in this state of the law, why the court should have disagreed with the Master. There was no manifest error to justify the court in overruling him.

The learned trial justice in order to sustain the application of the rule of a constructive trust was compelled to evolve theories from, or adopt interpretations of, facts, inconsistent with the actual facts themselves and inconsistent with the well-established legal relations of the parties. In his opinion, in giving the reasons why Ambrose, as the Receiver of the Building Association, could not purchase, he says, referring to the sale in question, that it was in substance a sale of *property belonging to the Association* (R., 16); that Ambrose was *having it sold for the real owner, the Association he represented* (R., 16); that respondents joined with Ambrose in an effort to make a profit out of *property which he held in trust* (R., 16); that Ambrose and respondents

entered into joint speculation *in the trust property* (R., 16); that Ambrose was *making sale* of the *interest of the Association* in a piece of real estate, through a trustee under a deed of trust (R., 32); that the property thus sold was a part of *the property being administered by the court* (R., 28, 32); that the sale was *ordered by Ambrose* (R., 16); that the sale was made *by direction of Ambrose* (R., 16); that the duty of Ambrose was to use every proper means *to have the property sold at the highest price obtainable* (R., 16); that he was bound to do all that he could *to have the property bring the highest price* (R., 17); that Ambrose's conduct was a palpable *violation of his duty* (R., 16); that he was a *secret* purchaser bidding in the name of another (R., 16).

These theories or interpretations are neither supported by the facts found by the Master and confirmed by the court, nor capable of being sustained by the established rules of law governing the rights, liabilities, duties and relationship of the parties to the sale in question. First, let there be considered the question of what was being sold. The Building Association was the creditor of Schwab. The legal title to the property, under the trust given by Schwab to secure his debt to the Association, was in Casilear, the trustee, whose duties were, as is usual in such deeds, to reconvey to Schwab on payment of the indebtedness; or to sell on default in payment of the indebtedness, pay the same and charges, and as to the surplus, if any, to pay it to Schwab. The equitable owner of the property was, therefore, Schwab. Plainly, the Building Association was not the owner of the property sold or of any interest therein. It was but a contract lien creditor.

Sis vs. Boarman, 11 D. C. App., 116, 131;
Tyler vs. Moses, 13 D. C. App., 428.

It is a curious fact and typical of the casual way in which this case was initiated, progressed and was concluded in the trial court, that to this moment the actual claim, if any, of the Building Association against this property has never been shown; a fact alone furnishing ample ground for the reversal of the decree. No pretense is made that the Receiver has any evidence of a debt due from Schwab. For all that is known, therefore, the claim of the Building Association may have been material, or it may have been infinitesimal, or it may have been absolutely non-existent. The records of the Building Association were irretrievably lost, and the only foundation for the claim of a debt due to it by Schwab was suppositious, based on the finding in the records in the office of the Recorder of Deeds of the unreleased trust (R., 41, 43).

It was assumed, wholly without warrant, that because there was a trust unreleased there was in reality an indebtedness, but no indebtedness by Schwab has ever been shown, no note evidencing the same produced. The trust was made in 1899, eleven years before the sale (R., 6). The presumption is that in the ordinary course of business of these associations Schwab made his monthly payments, but we do not know what they were. Certainly in eleven years some part must have been paid, probably a considerable part was paid, possibly all was paid, for a payment of $25 or $30 per month would cover it, a payment not out of proportion to the loan. It is not uncommon for debts to be paid and trusts stand unreleased of record, particularly with more or less uneducated people. Schwab may have been free of the debt and dead for all we know; he has never been heard of apparently as participating in this case or this transaction. The existence of the trust unreleased is, in

no event, evidence of the debt. The trustee could have refused to sell without evidence of the existence of the debt. Equity would not have foreclosed without evidence of the existence of the debt.

Furthermore, it must be remembered that after two attempts to publicly sell this property, it did not bring sufficient to satisfy tax liens, and Wilson was compelled to add to his bid to meet them and secure the benefit of his purchase (R., p. 7).

What status therefore had the Receiver to claim any profits of the re-sale from these respondents, or even any proceeds of the original sale? How could the trustee have paid them to him? How could the court decree them to him? They might be claimed by Schwab. There is not an iota of evidence to show whether the building association or Schwab is entitled to them. As Schwab is not a party how could his rights be determined as to the proceeds, if any, after the payment of the tax liens? And Schwab could not claim anything from the re-sale because there was no fiduciary relation between him and Smith, Wilson or Ambrose. It has been settled by numerous decisions that the owner of the equity of redemption has no status to complain of a purchase by one holding a fiduciary relation, not to him but to the party secured, on the theory of a constructive trust. His remedy is limited to cases of actual fraud in the sale.

The Special Master in his report was very careful to point out that the property sold was not that of the building association, which had merely a lien, but of Schwab; that if there were any legal right to complain of the sale it would be in Schwab, who would be the party primarily aggrieved; and that it did not appear Schwab or his assigns ever complained. He was also careful to

point out that it did not appear that Schwab was financially irresponsible, or that the building association did or did not pursue or press its claim against Schwab for a deficiency on the sale (R., 10), which is another evidence of the abandonment by the stockholders and their counsel of record of all interest in this litigation or the matters connected with it, another evidence of their negligence and failure to make inquiries pertinent to such matters, another evidence of such gross laches as bar relief, as will be discussed later.

As neither Schwab nor the trustee, Casilear, are parties, can the decree bind Schwab's interest, or is it proper in any event? A court should not act where it can make no decree between the parties before it on their rights independent of the rights of those not before it:

Mallow vs. Hinde, 12 Wheat. 193, 6 L. Ed. 599;

and no decree for distribution of a fund of surplus money on a mortgage sale can be made until all persons interested are made parties;

De la Vergne vs. Everson, 1 Paige, 181.

In the light of the foregoing how could there be justification for the conclusion of the trial justice that the property sold was the property of the building association; that it was the real owner; that Ambrose held it in trust; that the sale was of an interest of the association; that the property was being administered by the court. The learned trial justice was probably led into these broad, sweeping assertions by the decision in Harrigan vs. Gilchrist, 121 Wis. 127 (cited in brief for petitioner) which he quotes from at length (R., 33). The opinion in that case seems to be predicated on statutory provi-

sions, as indicated by the quotation. I have never examined this opinion of about 400 pages or nearly a full volume of reports; or deemed it necessary to go beyond the syllabus, showing it to be a case of a Receiver buying at his own sale. Whether it be based on statutory provisions or not, it is opposed to both the weight and preponderance of opinion on the point quoted,—the well-known trust-fund doctrine. The proposition there advanced that property the title to which is in another and adversely claimed could be reached in equity as the asset of an insolvent corporation on the theory of its being trust property, has long since been repudiated.

Hollins vs. Briarfield Coal & Iron Co., 150 U. S., 371, 381-6; 37 L. Ed., 1113;
O'Bear Jewelry Co. vs. Volfer, 106 Ala., 205, 222, 226.

The sale in question was a sale by a trustee under a power in a deed of trust, and was in the sole control of that trustee. The trustee was bound to make the sale in accordance with the terms of his power, and so long as he did so he could not be interfered with. He represented both the debtor and creditor parties to the trust.

Richter vs. Jerome, 123 U. S., 233, 247; 31 L. Ed. 132, 137;
Gray vs. Robertson, 174 Ill., 242.

His duty was to make the sale for the creditor, as provided by the trust, and to conduct it fairly *for the debtor*.

Smith vs. Olcott, 19 D. C. App., 61, 77;

He acts independently of either party.

Chesapeake B. R. Co. vs. Washington P. & C. R. Co., 27 D. C. App., 587, 599.

The court could not therefore in this dissolution proceeding control the sale or interfere with the equitable interest and rights of the debtor or the legal title of the trustee, or in any proceeding unless the trustee should be guilty of misconduct or fraud.

> Bank of Metropolis vs. Guttschilck, 14 Peters, 19, 29; 10 L. Ed., 335, 340.
> Insurance Co. vs. Barker, 17 D. C. App., 205, 218.
> Anderson vs. White, 2 D. C. App., 408, 417-18.
> Shea vs. Duldin, 3 Mac A., 339.
> 27 Cyc. 968, 1148.

The appointment of the Receiver could give no control, or right of interference;

> Hitz vs. Jenks, 16 D. C. App., 530;

for the appointment of a Receiver cannot affect the status of contract liens.

> Kneeland vs. American Loan & Trust Co., 136 U. S., 89, 97; 34 L. Ed. 379, 383.
> Fourth Street Nat. Bk. vs. Yardley, 165 U. S., 634, 683; 41 L. Ed. 855, 865.
> McRae vs. Bowers Dredging Co., 86 Fed. 344.
> Cohen vs. Gold Creek Nevada Mining Co., 95 Fed. 580, 583.

In Blossom vs. Mil. & Chi. R. Co., 3 Wall. 196, 18 L. Ed. 43, 46, the court held that the solicitor for complainant in a foreclosure sale could not control the officer making the sale because the latter had a discretion and a duty to all parties. The principle of the trustee's absolute title and control was strictly applied in a well considered opinion in Fletcher vs. Ann Arbor R. Co., 116 Fed., 479, in the decision of which Justices Day and Lurton participated. In that case the Receiver appointed to sell in a foreclosure proceeding was accused of fraud

in depreciating the value of the property and being a member of the purchasing syndicate. The court held that in the absence of fraud or neglect on the part of the trustee in the mortgage deed the beneficiary in the mortgage could not avoid the sale; that the trustee not having opposed the sale the beneficiary was bound. In Richter vs. Jerome, *supra*, on the same principle the court held that bondholders secured by a mortgage had no interest except that which the trustee held or represented, and therefore were not necessary parties to the foreclosure. In Merryman vs. Blount (Ark.) 94 S. W., 714, it was said that the rule that the beneficiaries of a trust might buy at a sale under the trust, was based on the fact that they had no control of the sale, *the trustee not being under their control*, as distinguished from a mortgage with power of sale; that the object of a trustee was to permit parties to buy. This was the ruling also in Smith vs. Black, Trustee, 115 U. S., 308.

A leading case of this court, in point, deals succinctly with the proposition—Twin Lick Oil Co. vs. Marbury, 91 U. S., 587, 591, 23 L. Ed. 328, a case of a director purchasing at a trust sale property of his company securing a debt to him, in which the court laid particular emphasis on the fact that the sale was by a trustee, as distinguished from the case of a purchase by a fiduciary who was also the seller. The court said: *"The defendant was not here both buyer and seller.* A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted, and who in this respect was the trustee of the corporation (the grantor in the deed of trust) and must be supposed to have been selected by it for the exercise of this power."

Considering now the question of Ambrose's relation to the sale and alleged control of it, it is obvious that the

learned trial justice was wrong in his conclusion. He improperly treated the case as one of a trustee buying at his own sale the property of his *cestui que trust,* as in Harrigan vs. Gilchrist (R., 16, 32). It is clear that Ambrose was not buying the property of his *cestui.* It is equally clear that it was not a sale under his direction or control. It follows from the facts and the law that the only positive duty he had in the premises was to demand that the trustee act under his power. This duty he performed. He requested the trustee to make a sale (R., 6). He attended both at the first attempted sale, and at the subsequent sale (R., 6, 7). He gave no instructions or directions to the trustee (R., 7). There was no active participation in the sale either by him or his attorney, Smith, in any way affecting its fairness or integrity (R., 7, 9). No improper influence was exerted by anyone at the sale to prevent competition, or to close competitive bidding, or to bring about the sale to respondent, Wilson, in preference to anyone else or at any particular price or figure (R., 9). The evidence is to the contrary, that the sale was fairly conducted on competitive bidding (R., 9). At the first sale Wilson was the high bidder (at 4½c per foot), but the trustee withdrew the property for inadequacy of bid (R., 6, 9). At the second sale Wilson was the high bidder at 6½c per foot, or an advance of 40% (R., 6, 9, 11). It may be said that Ambrose could have obtained authority of the court to bid the property in to protect the trust indebtedness, but is it likely the court would have approved the speculation, with the facts before it showing that the Building Association had no substantial intetrest to protect, and involving the assumption of prior liens and the expenditure of receivership assets to carry the speculation? Would that have been consistent with a winding-up receivership? Is it not indisputable, therefore, that

Ambrose had not only done his full fiduciary duty, but had in fact done nothing to prejudice the rights of the Building Association, his correlate, as was decided by the Appellate Court. What justification is there for the statements of the trial justice that Ambrose ordered the sale; that he was making the sale; that it was made by his direction; that he was bound to do all that he could to have it bring the highest obtainable price; that his conduct was a palpable violation of his duty.

It will be borne in mind that the theory of the opinion of the trial court was that Ambrose alone came within the rule of a constructive trust, but because the purchase was a joint one the respondents were liable with him (R., 16). Now in the light of the facts shown can it be said that the rule appled to Ambrose in this instance? I maintain it is clear that it does not. One of the most comprehensive definitions of a constructive trust is that given by Judge Sanborn, C. C. A., in the case of Trice vs. Comstock, 121 Fed., 620, often cited. After outlining the underlying principles he says:

> "The only indispensible elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or the interest he acquired through it to *prevent the other from accomplishing the purpose of the relation.*" (Italics mine.)

And again he says, referring to the different fiduciary relations between parties, that

> "no one of them shall use the interest or knowledge which he acquires through the relation so as to *defeat or hinder the other party to it in accomplishing any of the purposes for which it was created.*" (Italics mine.)

The rule has been more generally stated that the test of a constructive trust is the fiduciary relation and a betrayal of the confidence reposed or some breach of duty imposed under it.

> Boone vs. Chiles, 10 Pet. 177; 9 L. Ed. 388;
> How vs. Howe & Owen Ball Bearing Co., 154 Fed. 820, 829;
> Naddo vs. Bardon, 51 Fed. 493, 500;

In Steinbeck vs. Bon Homme Mining Co., 152 Fed. 333, Judge Sanborn said:

> "The test of the existence of a constructive trust is the fiduciary relation and the betrayal of the confidence reposed under it *to acquire the property or interest of his correlate.* * * * There must be some betrayal of confidence, some breach of duty, some bad faith, some abuse of the fiduciary relation to create the trust." (Italics mine.)

That was a case of an attorney purchasing the property of his client at a tax sale by a sheriff, and it was held not within the rule. In O'Bear Jewelry Co. vs. Volfer, *supra,* it was said there must be *some unconscientious conduct.*

From these statements of the rule it is apparent that the mere fact of the existence of a fiduciary relation to the person or the matter in question, is not sufficient alone to call for the application of the rule. There must be also betrayal of confidence or breach of duty, some bad faith; and as said by Judge Sanborn, it must be *to acquire the property or interest of the fiduciary's correlate.* In other words, as I have before pointed out, in order to support the maxim that Equity regards substance rather than form, there must be injury or loss to the correlate in respect of his property or interest.

Clarke vs. White, *supra;*
Symmes vs. Union Trust Co., *supra;*
Douglas vs. Blount (Texas), *supra;*
Yuster vs. Keefe (Indiana), *supra;*

In this case the facts show clearly that not only was Ambrose, in this particular instance, however much he may have been in others, not guilty of any betrayal of confidence, any breach of duty, any unconscientious conduct, any bad faith, any abuse of his fiduciary relation, but on the contrary that he performed his full duty conscientiously. It is also shown that the building association suffered no injury whatsoever, because after two attempts on the part of the trustee to sell it was apparent that under a foreclosure the property would not bring sufficient to pay tax liens (R., 7). It is further shown that there is no proof of any indebtedness to the building association to which the proceeds of sale were applicable even had there been a surplus after the satisfaction of the prior liens.

As before stated, there is no case in which a purely technical constructive trust has been allowed. It will not be applied on form alone; it has been denied often because the claim was lacking in substance as in some of the cases cited in this brief, of which an instructive one is that of Twin Lick Oil Co. vs. Marbury, *supra*, as is also Ryan vs. Williams, 100 Fed. 172, 176. The building association had no tangible interest, no subject matter, upon which the fiduciary relation of Ambrose could operate, and therefore it was not affected in the slightest by the sale. In the case of Melms vs. Pabst Brewing Co., 93 Wis., 153, 170, the Court said (in a case of actual fraud), referring to the parties claiming: "Their rights, therefore, were technical rather than substantial;

they had no rational hope of realizing anything in due course of administration. * * *"

Counsel for petitioner in his brief undertakes to deduce that Ambrose in this case stood in the same position as a mortgagee, but that cannot be in the view of the law laid down in the authorities I have cited, especially as the quotations in the brief for petitioner will not be found apposite. A deed of trust, while a modern substitute for the mortgage, is not the same in substance, even if it could be said to be the same in form. In the mortgage the mortgagee was empowered to sell, and thus like a pledgee, became the trustee of the mortgagor in case of a sale. This very relation made it difficult if not impossible for him to safely buy except by foreclosure in Equity. The modern deed of trust was the development to avoid this difficulty. And the general rule laid down with respect to modern foreclosure sales is that *"any person* may become a purchaser at a mortgage foreclosure sale *under a power in the mortgage*, who does not stand in such a relation of trust or confidence *to the mortgagor* (Italics mine) as to make his purchase a fraud or breach of duty."

27 Cyc. 1482.

Schwab was the maker of the trust in this case, and neither Ambrose nor respondents held any fiduciary relation to him. The Special Master therefore correctly applied this rule, as he pointed out, in his conclusion.

It is apparent that there is neither a fact nor a principle of law to support in this case the theory of a constructive trust. The correct principle upon which the case rests was that adopted by the Appellate Court, that the Building Association was not prejudiced in the transaction. An exact analogy to this principle is found in

another well settled rule of law, followed in innumerable cases, and clearly laid down in Schroeder vs. Young, 161 U. S. 334, 340, 40 L. Ed. 721, 725, that the attorney for the execution creditor may purchase at the execution sale, provided it be not to the prejudice of his client; and that inadequacy of price is not sufficient ground to set it aside; though if the facts throw doubt on the fairness of the sale *the debtor may redeem* (Italics mine). Now in this case Ambrose stood in just such a position of trust and confidence toward the Building Association as an attorney would stand toward his client in respect of an execution sale. There is another close analogy in the case of Sallade's Appeal, 36 Pa. 429, in which it was held that the attorney for the assignee for the benefit of creditors occupied no such fiduciary relation as would prevent his buying a note of the assignor.

There is a still further close analogy in a rule also laid down in many cases; and, for the purpose of showing the application of the principle, the argument of the learned trial justice that Ambrose was both buying and selling the property of the Building Association may be conceded. It is the rule that a person occupying a fiduciary relation may purchase the property of his correlate at a sale brought about by a third person which he had taken no part in procuring and over which he could have had no control.

> Allen vs. Gillette, 127 U. S., 589, 596; 32 L. Ed. 271, 274;
> Starkweather vs. Jenner, 27 D. C. App., 348, 357;

The former was the case of an executor purchasing at a *deed of trust sale* of the interest of one of the devisees in the property of his testator. The latter was the case of a

purchase by some of the members of a syndicate of the Syndicate's property *at a trustee's sale*. It was affirmed by this court (216 U. S., 524; 54 L. Ed., 602), the court saying: "Even a trustee has been held competent to purchase the trust property at a judicial sale which he has no interest in nor any part in bringing about, and which sale he in no way controls;" and citing Allen vs. Gillette, and Twin Lick Oil Co. vs. Marbury, *supra*.

Now Ambrose in a proper sense neither brought about nor procured the sale. The sale was brought about by the default of the trust debtor. The only part of Ambrose in it was to notify the trustee of that default and request the sale. Neither did he procure the sale. The word "procure" has a broader defined meaning than that of "request." It imports in a sense some control obtained or advantage secured by effort, inducement, contrivance, solicitation or urging. In fact one of its exact definitions is to take care of, care for, look after, manage or administer; all of which import control.

An examination of all the cases applying this rule shows that the courts have had primarily in mind the question of possible control of the transaction by the fiduciary, and that where the duty of control is cast upon another they have applied it and left the fiduciary free of the prohibition. In Leavenworth Co. vs. Chi. R. I. & P. R. Co., 134 U. S. 688, 704; 33 L. Ed. 1064, 1072, the Court held that the facts that some of the trustees in a deed of trust of the railroad company were directors and stockholders of the company procuring the foreclosure, one of them president of both companies, and that the attorney of the mortgagor company previously represented the other company, were not sufficient to avoid the foreclosure *in the absence of fraud*. This was followed in Pewabic Mining Co. vs. Mason, 145 U. S. 349, 361; 36 L. Ed. 732, 736.

Following this principle the exception has been allowed in many cases of a fiduciary purchasing the property of his correlate, of which some are:

Dexter vs. Harris, 2 Mason 531 (Judge Story) where the purchase was of the intestate's property by the Administrator and the sale was made on the petition of the Administrator to pay debts;

The Ruby, 38 Fed. 622, holding the proctor of the libellant in admiralty could purchase at the sale on execution, though if the price greatly inadequate the sale would be scrutinized for any fact which might affect its fairness;

Cooley vs. Cooley's heirs (Tenn.) 37 S. W .1028, where the purchase was of the intestate's property by the Administrator and the sale was made on a bill filed by the Administrator; the court saying, however, it would be scrutinized for fraud;

Wagner vs. Swift's Iron & Steel Works (Ky.) 26 S. W. 720, where one of the Receivers, as Commissioner of the Chancery Court, sold the property of the insolvent corporation, and *his co-receiver agreed before the sale to become jointly interested with the purchaser in good faith;*

Hess vs. Voss, 52 Ill., 472, 481, in which the Court said there was no rule of law which prohibited an attorney from purchasing his clients' property at a Master's sale in good faith;

Mansfield vs. Wallace ,217 Ill., 610, in which it was held that an attorney could purchase property of his client in a partition suit brought by him, where sold by the Master;

Harr vs. Payson, 157 Ill., 244, in which it was held an attorney could purchase property of his client at a sale *by a trustee under a trust;*

Lee vs. Howell, 69 N. C. 200, which held that a guardian could purchase lands of his ward at a sale by a clerk or master;

Ewing vs. Parrish, 148 Mo. App., 492, 501, holding that an attorney for an administrator purchasing at a sale under a trust could not be held a constructive trustee, where the administrator and the heirs had abandoned any protection of their second trust;

Ex parte Crump, 84 Tenn., 732, and

Blackman vs. Shelby, 27 Tenn., 438, holding a guardian could purchase in good faith lands of his ward at a sale by a Commissioner in Chancery;

Lusk's Appeal, 108 Pa. 152, holding it to be the conceded law of Pennsylvania that a trustee could purchase at a judicial sale not controlled by him;

Bruner vs. Finley, 187 Pa. 389, and

Anderson vs. Butler, 31 S. C., 183, holding a trustee could purchase his *cestui's* property at sheriff's sale;

LeConte vs. Irwin, 19 S. C. 554, 559, holding attorney for plaintiff in foreclosure suit may purchase;

Mulherin Sons & Co. vs. Rice & O'Connor, 106 Ga., 810, holding that partners were not called upon at a foreclosure sale to see that the property brought sufficient to protect the mortgage notes held by their deceased partner, and could purchase.

It will be noticed that the principles underlying the rules above relied upon, the lack of control of the transaction, and the absence of any prejudicial conduct, are the controlling ones in these varying cases. In the cases of Twin Lick Oil Co. vs. Marbury, Allen vs. Gillette, Harr vs. Payson, Ewing vs. Parrish, the sales were, as in this case, not judicial, but *by a trustee under a power.* In others of the cases cited, including the case of Stein-

beck vs. Bon Homme Mining Co., from which I quoted Judge Sanborn, they were sales by officials not judicial officers.

In most of these cases there were in a way the so-called elements of bringing about and procuring the sale, yet the court apparently rested the decision on the fact that there was no control, and no improper influence in bringing about or procuring it. This makes it clear that the use of the expressions "brought about" and "procuring" are not to be interpreted loosely as including proper action in initiating the sale, but rather some improper action in or method of the procurement or bringing about of the sale. The proposition was aptly put in Barber vs. Bowen, 47 Minn. 118, 123, in which the Court said: "It is only when power and duty, the constituent elements of a trust, towards a specific matter, are conferred that the fiduciary character and responsibility begins." Here Ambrose neither bought nor sold the property of the building association; he bought the property of Schwab, subject only to the lien of the building association; he had no power to control the sale, and did not attempt to control it. He neither committed nor attempted to commit any actual fraud. He was not guilty of any breach of duty, or any prejudicial conduct.

The situation of the fiduciary in many of these cases is very similar to that of Ambrose in this case; substantially, it is exactly alike. In principle the cases are identical. And the analogy of principle in all these cases with the case presented by Ambrose's situation and with the principle of the rule of the constructive trust is perfect. A careful analysis will show that they are all predicated upon one logical trend of thought, which when applied to separate and distinct situations leads to separate and distinct but harmonious conclusions, viz:

1. When one occupying a relation of trust and confidence acquires the property or interest of his correlate in a transaction directly between them, or in a transaction with a third person which he controls, he is doing that which, in order to remove the temptation or suspicion of wrong-doing, equity forbids him doing, on the presumption that with the opportunity to influence his correlate growing out of the relation of confidence, or the opportunity to control his correlate's property by reason of the relation of trust, he cannot deal with it to his own interest and in good faith to his correlate.

2. But when one occupying a relation of trust and confidence acquires the property or interest of his correlate in a transaction controlled by a third person, in good faith, and without being guilty of any betrayal of his correlate's confidence, and without prejudicing the rights of his correlate or causing him loss or injury, he is doing that which equity permits him to do, because the presumption that he is not dealing in good faith with his correlate not only cannot arise in that situation but is actually negatived by the existence of good faith and absence of prejudicial conduct and loss or injury.

The case of Twin Lick Oil Co. vs. Marbury is conclusive of this case.

But going a step farther, and still conceding for argument the contention that Ambrose could not purchase, there is another fact of some importance entering into the consideration of this sale. Technically, Ambrose was a purchaser with Smith and Wilson, but the character of his interest and the manner of its acquirement should be borne in mind. He was not actually a purchaser at the time of the sale; and neither was Smith. They in fact became interested in the property after the purchase by Wilson, and only were to become interested in the event

of a purchase by Wilson. The purchase was by Wilson on his own responsibility and judgment, and they were not concerned in the act of purchase of the property itself. They may never have become purchasers. The Special Master states the facts, as confirmed and quoted by the Court, very carefully, as follows:

> That when Ambrose, Smith, Wilson and Weschler (the auctioneer) were walking away after the first attempted sale, Weschler remarked that any property in the city of Washington that could be bought for ten cents a foot or under was cheap property; that Smith stated to Wilson that if he (Wilson) wanted to bid again, he (Smith) would be willing to take an interest in the property, *if he Wilson should be the highest bidder;* that Ambrose stated that he would go in, too, *in the event Wilson should become the purchaser at a second sale;* that the agreement between them, therefore, seemed to be that Wilson was to use his own judgment in bidding at the second sale, both as to bidding at all and as to the amount of his bid, and *if he should happen to become the purchaser thereof*, the three should be jointly liable and jointly interested; that Wilson made his bid at the second sale in the exercise of his individual judgment and without any conference with Ambrose or Smith, both present and not participating in the sale in any way (R., 6, 7).

How can the court, in view of the auctioneer's presence, state that Ambrose was a secret purchaser bidding at this sale (R., 16). Wilson was an entire stranger to the property interests and the litigation. He attempted to purchase for himself at the first sale and was the high bidder. He bid and purchased at the second sale on his own judgment, fortified by the opinion of the auctioneer, without any conference or arrangement. The agreement

was not secret or that they should purchase by pre-arrangement, but rather open and contingent that if Wilson became the purchaser, presumably at a speculative value, *Smith and Ambrose would help him to carry his speculation.* Wilson neither invited nor refused the participation of Smith and Ambrose on that contingency. He was in every sense a *bona fide* purchaser; and the trial court did not hold otherwise, but decided that he was liable because he permitted the participation of Ambrose; and so also as to Smith (R., 16). On that theory the court was wrong:

Price vs. Winter, 15 Florida, 66;

in which the court held that an executor could not purchase at his own sale, but that if a third person was interested in such bid a court of equity should not set aside the sale as to the third person, where the sale was made by commissioners for full value and there was no fraud in fact, *because he was a bona fide purchaser whose right should not be disturbed.*

As above stated, the trial court held Smith as Wilson, because he permitted Ambrose to participate in the speculation (R., 16). But by the authorities already cited there was no prohibition against Smith purchasing at a sale he could not control, being in the position of attorney for an execution creditor, substantially, and that is no doubt the reason the trial court did not attempt to hold him on the theory of a fiduciary relation on his part. He was, therefore, at liberty to join with Wilson in his purchase or speculation on any terms, and was, therefore, as much a *bona fide* purchaser as Wilson.

How, then, being *bona fide* purchasers, can Smith and Wilson be held as constructive trustees merely because they permitted Ambrose to share in the profits of their purchase. That would be a correct theory if there was

actual fraud in which all participated, but this is not a case of actual fraud. The difficulty in this case seems to have been caused by a failure to differentiate by applying the rules and principles governing cases of actual fraud, instead of the rules and principles governing constructive fraud, which are more liberal to the person charged and more restrictively applied because of the fact that when applied they would brand with moral fraud many persons who have acted in an honest belief of their rights, as is plain was done in this case.

But neither Smith nor Wilson is charged with actual fraud; neither of them occupied a fiduciary relation; neither of them was therefore guilty of a breach of duty or a betrayal of confidence. Their profits were their own, and no one else has a right to claim them. The fact that they surrendered part of their profits to Ambrose furnishes no reason for the court reaching out and drawing the part of their own profits which they retained after the part which they surrendered to Ambrose, on the ground that the part which Ambrose received could not lawfully be received by him. The rule of a constructive trust is that the party aggrieved may have the transaction set aside or may ratify it and claim the profits accruing to the implied trustee. Petitioner's position in this case is that he ratifies the sale and claims the profits. Certainly Ambrose's profit could not taint the profits of Smith and Wilson, if the transaction by which they acquired them was not tainted, if no principle of a constructive trust could be applied to hold them. The most that can be claimed on the theory of a trust is the profit received by Ambrose, and the present Receiver has taken his separate decree against Ambrose for that (as well as for the profits of Smith and Wilson). This was the decision in Price vs. Winter, *supra*.

It must be borne in mind that in the more modern cases on this question the English rule, that a purchase by one occupying a fiduciary relation to the subject matter of the transaction is void, has not been followed in this country. It is voidable only at the election of the *cestui* or correlate on a seasonable demand:

Hammond vs. Hopkins, 143 U. S., 224; 36 L. Ed., 134;
Twin Lick Oil Co. vs. Marbury, *supra;*
Pacific R. R. Co. vs. Ketchum, 101 U. S., 289; 25 L. Ed., 932.

The truth of the matter is that this whole proceeding in the trial court had no solid foundation in law, principles or morals; and the superstructure was flimsy. It rested wholly on an atmosphere of suspicion. The attempt was made, notwithstanding a voluntary denial of any imputation of actual fraud, to hold these respondents liable for having gained a profit by a breach of duty; a profit made inferentially because of supposed inadequacy of price, for I take it the Receiver would not have set up a constructive trust if the speculation of these purchasers had proved unprofitable. It is an attempt to build up out of supposed inadequacy of price an inference of fraud, notwithstanding the principle enunciated in innumerable cases that inadequacy of price alone is not ground for setting aside a sale; that it must be either so gross as to shock the conscience of the court or be accompanied by such other facts as themselves raise the presumption of fraud. No such presumption arises out of the mere inadequacy, alone.

Graffam vs. Burgess, 117 U. S., 180, 191; 29 L. Ed. 839, 842;
Hayes vs. Huddleson, 40 D. C. App., 183, 191;

On a review of the merits of this case, it is undeniable that the Court of Appeals correctly applied the principles of law governing the facts, and its decision should be affirmed.

THE LACK OF EQUITY IN THE DECREE.

The decree reversed by the Appellate Court is from every point of view punitory. It undertakes to mulct respondents of a considerable sum of money under an abstract theory of law notwithstanding they acted in good faith. At most it might be said that they were guilty of a violation of professional ethics; but courts do not punish violations of professional ethics by excessive fines imposed as money recoveries upon theories of law and under the guise of protecting rights, legal or equitable, which were in fact not interfered with or disturbed, of parties to whom no injury was done. There is not a principle of law, not the authority of a single case, which holds that Smith and Wilson did anything that they could not properly and legally do in making their purchase; and the court concedes that when it says *inter alia* (R., p. 16): "It was a speculation which *one* of the speculators was forbidden by law to engage in, as they knew." So they are held and punished, not because of any wrong on their part, not because of any liability on their own account, legal or equitable, not because the transaction itself was tainted with fraud, not because they were constructive trustees which they must be to create the liability, but upon the technical theory that they associated with themselves a constructive trustee when they let Ambrose in, at his request and without solicitation on their part, on a speculation in which they had a right to embark, and in which Ambrose, by reason of his

not occupying any fiduciary relation to the property or its owner and by reason of his not controlling or interfering with the sale in any manner, was believed by them to have the same right to participate which they had.

But there is another and a peculiar feature of this case rendering the decree of the trial court punitive and most inequitable.

The relief granted by it will not inure to the benefit of those for whom it is ostensibly sought, the stockholders generally, because on the face of the record:

First, it will be consumed, in part, if not wholly, in the expenses of administration in an endeavor to ascertain the distributees;

Second, it will be consumed, in part, if not wholly in the expenses of administration by way of allowances to the Receiver and his counsel.

It will therefore be penalizing Smith and Wilson for doing nothing wrong or injurious, to create a fund for other officers of the court instead of for distribution among those in whose behalf and because of whose supposed injury or invaded rights the recovery is sought.

I have already pointed out and quoted the finding of Special Master Dent, under a reference directing a statement of distribution, that he was unable to state any distribution to stockholders for the reason that there was no evidence in the case of individual stockholdings (R., 43). The facts upon which that reason was founded are shown in the statement of evidence (R., 40-3), and are in substance that but 30 stockholders out of 602 ever appeared or interested themselves in the litigation outside of the defendant officer creditors, Brown, Freeman, *et al.;* that the records being lost the former Receiver did not and the present Receiver does not know who were the stockholders; that the former Receiver, by advertisement,

was unable to ascertain the names and addresses of more than 73 per cent of all of the stockholders, some of whom did not know their own holdings. The funds in the hands of the Receiver have all been exhausted except less than $300 (R., 72, 74). The claims of the Receiver to probable assets have all been disposed of (R., 73-4). It is plain, therefore, that no distribution could be made of this fund except by proceedings before the Auditor or a Master, involving public notice, extended hearings, voluminous accounting and large fees. Moreover, as has been pointed out, the court in settling previous allowances to the Receiver and his attorney reserved the right to make further allowances to the Receiver's attorney, with respect to this very matter and the proceeding against Ambrose for judgment (R., 74). The fees of the attorney for services already rendered in these matters and for further proceedings before the Auditor or Master would be necessarily large, and the Receiver would also be entitled to his commission on this recovery, if allowed. How, then, can any portion of this fund ever reach the persons for whom it is claimed—the stockholders—even in the shape of an infinitesimal dividend.

Beside, the allowance of this recovery with the expressed purpose of paying counsel fees out of it is improper. Conceding it to be in the nature of a recovery for damages, yet counsel fees are never an element of damages.

Day vs. Woodworth, 13 How., 363, 371; 12 L. Ed., 181, 188.

Flanders vs. Tweed, 15 Wall., 450; 21 L. Ed., 203;

U. S. vs. Nuestra Senora, 17 Wall., 29; 21 L. Ed., 596;

Philp vs. Nock, 17 Wall., 460; 21 L. Ed., 679;

Stewart vs. Sonneborn, 98 U. S., 187, 197; 25 L. Ed. 116, 120;
Tulloch vs. Mulvane, 184 U. S., 497, 511; 46 L. Ed., 657, 665;
M., K. & T. R. R. Co. vs. Elliott, 184 U. S., 530; 46 L. Ed., 673.

There are also several principles militating against the propriety of the allowance of interest on this recovery, as well as authority against it. Ordinarily interest is allowed as damages, when not contracted for, and from time of demand only:

Nash. & Lowell R. Corp. vs. Boston & Lowell R. Corp., 61 Fed., 237, 251.

The action in this case against Smith and Wilson is and must be in the nature of a tort action, a constructive fraud by conspiracy with Ambrose, according to the theory of the Court, inconsistent as this conclusion may seem; for as Smith and Wilson are not held as constructive trustees themselves, but are held solely for engaging in the purchase with a supposed constructive trustee, they are not held on the ground of any liability on their part; and they cannot therefore be held as in a contract action upon the theory of an implied contractual fiduciary relation. The recovery, therefore, is in the nature of damages in a tort action, and on this no interest can be allowed.

Ann Caroline vs. Wells, 2 Wall., 538, 547; 17 L. Ed., 833, 835;
Gray vs. D. C., 1 D. C. App., 20;

Moreover, an actual trustee is ordinarily not charged with interest, except for misfeasance or malfeasance. He is only chargeable from demand.

Knight vs. Reese, 2 Dallas, 182 ;1 L. Ed., 340;

And where the claimant has been guilty of laches, as will be shown in this case, interest is never allowed.

Redfield vs. Ystalyfera Iron Co., 110 U. S., 174; 28 L. Ed., 109.
U. S. vs. Sanborn, 135 U. S., 271, 281; 34 L. Ed., 112, 115;
Redfield vs. Bartels, 139 U. S., 694, 703; 35 L. Ed., 310, 313.
Nash & Lowell R. Corp. vs. Boston & Lowell R. Corp., *supra;*
Jourolman vs. Ewing, 80 Fed., 604, 607.

There has never been a time since the initial proceedings in this litigation that the stockholders have taken any interest in the affairs of the Association or the litigation, though a number were represented by counsel in the beginning. They, as matter of fact, have taken no interest in this claim. Are they, after their palpable neglect, or the Receiver and his attorney now representing them, to profit by charging the respondents with interest for a period of more than eight years, even if they could under the circumstances claim the principal. In the case of Marmion vs. McClellan, 11 D. C. App., 467, 494, which was a case of a constructive trust, the Auditor allowed interest from the date of the transaction. The lower court overruled this and allowed interest only from the date of its decree, and on appeal this was affirmed, the Appellate Court holding that where the trustee honestly believed the transaction was right and proper it would be inequitable to charge him except from the time of demand. In Gifford vs. N. J. R. & Transportation Co., 10 N. J. Eq. 171, the court said: "Long acquies-

cence is equivalent to a consent, and a counter equity arises from lapse of time to the equity raised by interference with a vested right."

Another reason making it inequitable to charge interest for a time before demand or decree is one commonly applied in equity. It is that, where a trustee is charged with interest for failure to properly invest funds, the earning capacity of the fund is commonly considered and a rate consistent with marketable conditions has often been substituted for the legal rate and a period deducted reasonable to allow for procuring investment, and this has been because the interest is allowed as damages, the charge against the trustee being measured by what the fund would have produced if invested, not as a punishment to him. The legal rate is never charged, except in cases of fraud, when it is compounded, as punitive. Now in this case if the fund claimed had been actually received by Ambrose and thus placed in *custodia legis*, in the natural order of things it would not have been invested and therefore would have earned nothing. There is no reason, therefore, for enhancing a fund by an accretion it would never have received, especially under all the circumstances of this case. Moreover, the Receiver never set up any claim to the interest though it was awarded in the decree; and interest to be allowed must be claimed.

D. C. vs. R. R. Co., 8 D. C. App., 322, 377.

It is not true, also, under all the circumstances of this case, that the allowance of interest as damages is punitive; and punitive damages are not allowable in torts except for wanton, offensive, malicious, or outrageous acts or gross negligence.

Day vs. Woodworth, *supra;*
Milwaukee & St. Paul R. R. Co. vs. Arms, 91 U. S., 489; 23 L. Ed., 374;

L. S. & M. S. R. Co. vs. Prentice, 147 U. S., 101, 107; 37 L. Ed., 97, 101.
Scott vs. Donald, 165 U. S., 58, 86; 41 L. Ed., 632, 635.

The allowance of interest is reviewable in the Appellate Court.

Redfield vs. Bartels, *supra*.

THE IMPROPER SEVERAL DECREES.

On the facts presented and the application of the legal principles discussed, it is indisputable that the conclusion of the Appellate Court in favor of respondents is correct. But aside from the merits of the case, there are other applications of legal rules, involving defenses of which respondents were deprived by the action of the trial court, and which are all sufficient to sustain the decision of the Appellate Court now here for review.

One of the errors of the trial court was in holding these respondents at all liable after the decree against Ambrose. The Receiver's report to the court, which was, as before stated, treated as his petition and the foundation of the proceeding against respondents, states:

> "That the arrangement referred to, resulting in the distribution stated of the profit made on account of the said sale, was manifestly an improper one, and, to the extent of the profit realized, constituted an unlawful profit out of trust funds, and, therefore, properly chargeable against the account of the said Ambrose by the Special Master, requires no demonstration" (R., 1-2).

The Special Master concluded from this statement that:

"It is not entirely clear whether the claim made herein, by said Receiver, is that the parties to the joint enterprise, and in the event it be determined that they are liable herein, should be charged jointly and severally to the extent of the entire net proceeds (profits) realized (namely, $790.90), or only to the extent that each one participating in the joint enterprise individually profited by the transaction (namely, the sum of $263.63). However, in view of the conclusion reached herein, the matter is not of special importance.

"In so far as concerns the connection of the former Receiver, Ambrose, with the transaction embraced herein, nothing further need be stated, since his liability has been fixed in this cause by surcharging his accounts, on final statement and settlement, with the entire amount of the net proceeds (profits), of $790.90, so realized upon the re-sale of the property, as above" (R., 11).

The trial court sustained the Exception No. 2 (R., 12) to this conclusion of the Master, and in so doing committed plain error; for there is nothing in the record to show any other claim by the Receiver. The trial court discussed fully the character of the liability and held that it was joint (R., 16, 17, 19, 20), and by so doing was led into error in its plural decrees. As before stated, the Special Master who settled the accounts of Ambrose surcharged him with the full amount of the profits on the re-sale by Smith & Wilson (R., 8, 43-4). Later, in this cause, on petition of the Receiver (petitioner) a decree was entered against Ambrose for the full amount found against him on this accounting, to operate as a judgment at law (R., 73-4). Now the splitting of the proceeding into two claims, one against Ambrose severally for the full amount and one against Smith and Wilson jointly for the full amount, was improper, and separate decrees in favor of both claims were improper.

Only one final judgment can be entered in any action. Separate ones against several defendants are improper. 23 Cyc., 812.

This proceeding is in the nature of a tort action, and the rule as to joint *tort feasors* is that they may be all sued jointly or each severally, but no intermediate number may be joined.

> Minor vs. Mechanics Bank, 1 Peters 46, 73; 7th L. Ed. 47, 59;
> Smith vs. Rines, 2 Sumn. 338;
> Dicey's Parties, 234.

The same is true as to a contract action where the liability is joint and several.

> Sessions vs. Johnson, 95 U. S. 347; 24 L. Ed. 396.
> Pelham vs. Price, Hemp., 222.

And plaintiff must elect whether he will sue severally or jointly. If he sues severally he waives the right of joint action; he cannot do both.

> Sessions vs. Johnson, *supra*.
> U. S. vs. Leffler, 11 Pet. 86, 97, 99; 9 L. Ed. 642, 646, 647.
> 23 Cyc. 1213 and cases cited.

The pleadings in this case, therefore, if such they may be called, were as irregular and improper in this respect as in others. The Receiver took a judgment against Ambrose for the full amount of these profits now claimed. It is immaterial that this judgment may be unsatisfied, as suggested by the court (R., 19-20), for the Receiver having elected to take the several judgment against Ambrose waived his right to sue them all jointly, and could not sue less than all jointly as he did when he claimed

against Smith and Wilson jointly. The rule has been applied specifically to actions grounded on fraud or to enforce a constructive trust. In Allis vs. Connor, 36 Mich., 283, it was held that a fraud must be sued on as an entirety, that it could not be separated into two causes of action and one settled for and the other left open. In German-American Seminary vs. Keifer, 43 Mich., 105, it was held that the bringing of an action, under the theory of a constructive trust, to recover an entire sum of money from one of the parties who divided with others precludes separate suits against the rest, because equity would not encourage the splitting of actions.

There is another principle upon which the decree against Ambrose bars the claim against Smith and Wilson, also embodying election. The Receiver does not repudiate the sale, but ratified it and seeks the profits. The law is settled that where trust property has been wrongfully diverted, the *cestui* may elect to pursue and recover the property in its original or converted form, so long as traceable, *or to treat the trustee as a debtor*, personally liable for his breach of trust;

39 Cyc. 532-3, and authorities;

that is to say, he may follow and trace the property in equity until identified in some specific fund or property in the hands of the trustee or a third person with notice;

39 Cyc. 530-2, 536, and authorities;

and this is the principle upon which the difference in the legal and the equitable remedy rests as I shall point out in my discussion of the remedy at law. If there be some specific property upon which equity may impress the trust sought, either in the hands of the trustee or other person,

then the remedy is equitable, but if a mere *money judgment against the implied trustee is sought*, then the remedy is in *assumpsit* and equity has no jurisdiction. When the *cestui* cannot trace the property his right to election is gone and he can only rely on the personal liability of the trustee;

39 Cyc., 534.

In Carter vs. Gibson, 61 Neb., 207, which was on a bill to establish a trust, the court held that by taking a judgment against his trustee for the price of property wrongfully sold the *cestui* ratified the sale and thereby waived his right to pursue the purchaser. As Ambrose is the only one concerned in this transaction treated as an implied trustee, by the trial court (R., p. 16), the personal judgment against him bars any right of recovery against Smith and Wilson in any event.

THE OTHER DEFENSES OF RESPONDENTS.

As before shown, the Receiver reported to the court the matter of his right to make claim on the transaction in question (R., 1-2). Subsequently he recommended to the court an offer of these respondents to arbitrate the claim (R., 3-4). When the question of the reference to Special Master Hoehling, agreed upon by the parties (R., 2-3), was presented to the trial justice, the latter declined to surrender his right to review the report of the Special Master on exceptions, and the reference was made by consent with this right reserved (R., 4-5). Whatever may have been the ultimate fact (R., 21-7) the agreement as originally made was as above stated, and respondents believed that the Receiver would abide by the decision of the Special Master, and would endeavor to impress the court with the propriety of that course, and

that the court would approve, inasmuch as their submission to equity jurisdiction, in the manner proposed, without pleadings, would involve the loss to them of opportunity to raise both legal and equitable defenses of moment.

As the proceeding was actionable at law, it was the duty of the court, *sua sponte*, in refusing to permit the arbitration, to have declined to take equitable cognizance and instructed the Receiver to proceed at law, rather than to have insisted on the right of the Chancery Court to determine it.

If the court conceived that the matter was properly cognizable in Equity and was unwilling to approve the arbitration by the Master, it was the duty of the court to have instructed the Receiver to proceed by a bill properly framed so that the respondents could avail themselves of their defenses.

The respondents were in an embarrassing position before the court, whose officers they were. They were accused of a breach of duty, and denied it. They had, however, to avoid litigation, expressed their willingness to have the matter determined by fellow members of the profession and to abide by the determination. The court, in this situation, should not have, while adopting the irregular method of submission, insisted upon the consent of respondents to the same being burdened with the court's terms and restrictions, in fact reducing the matter to litigation, while ignoring all of the forms and requisites of a litigated matter and the fundamental principles of law and practice underlying them, and depriving respondents of their defenses. Instead of laying hold of the proceeding and drawing it into equity by main strength, in its irregular form, the court should have been exceptionally considerate of the embarrassment of

these respondents, and should have insisted upon regularity of procedure, thereby according to them their full defense. That defense rested in part on objections which it was the duty of the court to consider even though they were not raised at the time of the consent reference, because they were all apparent on the face of the record and were jurisdictional.

It is true the respondents were derelict in not raising these questions at least at the time the exceptions to the Master's report were filed and before the court's decision, but they were embarrassed in the beginning by the court's attitude, and later were no doubt lulled into the belief that the court would not, in view of the character of the Master's finding, place upon them the stigma of a breach of duty, and so did not fully realize the seriousness of their position until confronted with the court's opinion overruling the Master, when they acted promptly. By reason of their peculiar and embarrassing situation they were in effect deprived of their defense in the beginning. That defense is largely one of estoppel; and where a party has no opportunity to plead estoppel by reason of the state of the pleadings, he may have the benefit on the trial and the court is bound by it:

> Phil., Wil. & Balto. R. R. vs. Howard, 13 How., 307, 335; 14 L. Ed., 157, 169.

This proceeding is indeed a remarkable one in every aspect in which it presents itself; remarkable in its initiation for the attempt to engraft on a pending suit a wholly distinct and unrelated cause of action, and thereby to invoke a jurisdiction which plainly the court did not have; remarkable in its procedure for extreme irregularity, being lacking in any and every essential form and requisite of pleading; remarkable in its culmination for a de-

cree technically applying to a transaction concededly devoid of fraud a rule of equity wholly inapplicable in the situation of the parties, and thereby branding the character of two reputable members of the bar with the ignominy of a constructive fraud for an alleged abstract breach of duty, notwithstanding they had no such duty cast upon them as would invoke the rule, and without a scintilla of proof that the Receiver or his insolvent corporation were or are entitled to the fund sought *as matter of fact*, irrespective of the law.

These defenses of respondents are five in number, as to all of which the error of the trial court was submitted to the Appellate Court, but not passed upon by that court in view of its decision on the merits. Four of them were considered by the trial justice in his second opinion (R., 27-35) on the motion to strike the proceeding (R., 20-1), which with the exceptions to the decree (R., 36-7) raised the jurisdictional questions. They are:

1. That the proceeding was multifarious,

2. That the Receiver had an adequate remedy at law and sought no equitable relief,

3. That if the trial court intended to hold the jurisdiction concurrent limitations should have been applied,

4. That if the trial court intended to hold the jurisdiction purely equitable laches should have been applied. The other defense, not considered by the trial court was;

5. That the Receiver failed to plead strictly and fully his right to the relief and any excuse for the laches. This the Appellate Court was asked to consider as manifest error, under the authority of,

> Treat vs. Jemison, 20 Wall., 652; 22 L. Ed., 449; and its own rule VIII, Sec. 5.

1. MULTIFARIOUSNESS.

The bill was for dissolution of the insolvent building association, defendant, and a Chancery Receiver to administer the assets (R., 40). The supplemental proceeding against the respondents (appellants) treating the Receiver's report, the foundation of it, as a petition against them, was for the recovery by the Receiver of a specific sum of money made by respondents as profit on a re-sale of real property purchased by respondent Wilson at a sale by a trustee (Casilear) under a trust to secure an indebtedness to the defendant Building Association (R., 1-2), which had therefore only a lien on the property.

The supplemental proceeding is not ancillary. An ancillary proceeding is one having distinct relation to the subject matter of the bill and solely to effectuate the purpose of the bill by obtaining relief necessary to make complete the remedy sought. The fund sought was not an asset of the corporation and therefore not within the control of the court. If it were property the legal or equitable title to which was in the corporation, and not adversely claimed, then it could have been reached by the court through an ancillary proceeding or summary process. It could not be reached on the theory that it was a trust fund of the corporation, as I have hereinbefore pointed out. The court could not interfere with the equitable interest and rights of the debtor or the legal title of the trustee, in any proceeding, unless the trustee should be guilty of misconduct or fraud:

Bank of Metropolis vs. Guttschlick, *supra;*
Insurance Co. vs. Barker, *supra;*
Anderson vs. White, *supra;*
27 Cyc. 968, 1148.

The two causes of action were separate and distinct, with different parties. The original bill was by stockholders against the officers of an insolvent corporation for dissolution. The supplementary proceeding was an action by the defendant corporation through the Receiver, against strangers to the proceeding, claiming an interest in monies the proceeds of property on which the corporation had a lien only. There was no relation between the two proceedings, either as to parties or subject matter. Had the two been joined in the original bill it would have been fatally defective. Distinct rights were asserted, calling for distinct and independent remedies and requiring different decrees, and therefore could not be joined.

Walker vs. Powers, 104 U. S. 245, 251; 26 L. Ed. 729.

Williams vs. Jackson and Jackson vs. Stickney, 107 U. S., 478, 484; 27 L. Ed. 529.

Holton vs. Wallace, 66 Fed., 409.

Security Savings & Loan Association vs. Buchanan, 66 Fed., 799.

In Walker vs. Powers the bill was to remove a cloud on title of property acquired at judicial sale, alleging fraud, and to subject other property of the trust debtor to the lien of a judgment debt In Williams vs. Jackson, the bill sought to set aside a fraudulent release by a trustee and to recover the debt from him. In Holton vs. Wallace, the parties were the same and the subject matter substantially the same.

In Curry vs. McCauley, 11 Fed., 365, 370, the court held multifarious a bill by an assignee in bankruptcy to set aside as fraudulent a mortgage by the assignor to his sureties on a bond and also for an accounting by one of the sureties for rent of the mortgaged premises. In Price

vs. Coleman, 21 Fed., 357, the bill by a Receiver was held multifarious because it joined claims for losses suffered by the corporation through the negligence of the directors and claims of stockholders for subscriptions to new shares obtained by misrepresentation of the directors. In Watson vs. U. S. Sugar Refinery, 68 Fed., 769, it was held multifarious to join in a bill against a corporation for dissolution a claim against officers and stockholders for fraudulent misrepresentations inducing the purchase of stock. In Van Auw vs. Chicago Toy and Fancy Goods Co., 70 Fed., 939, the bill was by creditors against corporation directors and their alleged fraudulent grantees, seeking recovery from the directors, under Statute and for unpaid subscriptions, and also recovery of the property from the grantees, and it was deemed multifarious. In New Hampshire Savings Bank vs. Richey, 121 Fed., 956, 960, the court held multifarious a bill joining an application for foreclosure of a mortgage of the corporation with claims against the stockholders for dividends distributed to them out of the rents of the mortgaged property on the ground that they were constructive trustees. In Moody vs. Flagg, 125 Fed., 819, it was held that bill against a trustee for breach of trust in making a sale and accounting and against members of an executive committee appointed to manage the trust property in the interest of an association of the beneficiaries on the ground of conspiracy with the trustee to effect the transfer, was multifarious.

The principle upon which some of these cases was decided seems to have been the joining of equitable and legal causes of action or claims for relief, which of itself renders a bill multifarious:

> Cherokee Nation vs. Southern Kans. R. R., 135 U. S., 641, 651; 34 L. Ed., 295, 300;

Scott vs. Armstrong, 146 U. S., 499, 512; 36 L. Ed., 1059, 1064;
Cates vs. Allen, 149 U. S., 451, 456; 37 L. Ed., 804, 807.

This was specifically assigned as the reason in Curry vs. McCauley and Watson vs. U. S. Sugar Refinery Co. *supra.* The original proceeding here was one of equitable jurisdiction. That the supplemental proceeding was a purely legal demand will be discussed elsewhere in this brief under the head of the remedy at law.

Neither will multifariousness be permitted to avoid a multiplicity of suits.

Haines vs. Carpenter, 1 Woods, 262, 267, 270.
Bay City Bridge Co. vs. Van Etten, 36 Mich., 210.

The rule allowing a single bill to avoid multiplicity relates to parties more particularly and not subject matters. It will not embrace suits between different parties as to unrelated subject matters; or even suits between the same parties as to different subject matters. Some of the cases just paraphrased illustrate the principles. A striking illustration is the case of Bigelow vs. Fischer, 102 Cal. 208, a bill by one partner against another for dissolution and accounting and to rescind a sale between them induced by fraud. Another striking case, also repudiating the trust fund doctrine, is O'Bear Jewelry Co. vs. Volfer, 106 Ala., 205, 222, 226. There the bill sought remedies against stockholders for balances of subscriptions, against the assignee of the corporation for accounting of his trust, against a bank for money it had collected prior to the assignment and paid over to stockholders, to have judgment confessed by the corporation to the bank before the assignment declared a part of the assignment,

to compel the bank to refund the money it had received in satisfaction of the judgment, and to have the assets thus brought together administered for creditors.

The rule of multifariousness cannot be avoided by supplemental proceedings. An entirely new cause of action cannot be injected into a suit by an amendment to the bill.

Shields vs. Barrow, 18 How., 130, 143; 15 L. Ed. 158, 161.

Warner vs. Godfrey, 186 U. S., 365, 377; 46 L. Ed., 1203, 1208.

Neither can a new cause of action be set up by a supplemental bill.

Root vs. Woolworth, 150 U. S., 401, 410; 37 L. Ed., 1123, 1125, 1126.

16 Cyc., 357, 361.

31 Cyc., 503.

In Warner vs. Godfrey, *supra*, it was held that a bill alleging actual fraud could not be amended by setting up a constructive fraud.

If any further authority be needed on this point, it is supplied by the case of Smith vs. Woolfolk, 115 U .S., 143, 148; 29 L. Ed., 357, 359, which is directly in point. That was a creditor's bill to subject land to the payment of debts. A receiver was appointed, the land was sold and distribution was made. A small balance was left in the receiver's hands, and this balance was allowed to him as compensation. A new petition was later filed by one of the original plaintiffs to reach the proceeds of lands in another state which had been acquired in fraud by another of the original co-plaintiffs, a mortgage creditor who had foreclosed. This court directed the dismissal of the petition, saying that it knew of no rule of equity

pleading or practice by which such a petition, if offered as an amendment to the original bill, could have been allowed. And the court particularly noticed the changed alignment of parties therein, like in this case.

It follows from the foregoing that the supplemental proceeding by the Receiver was multifarious on principle. Further than that he had no such status, nor could the court accord to him any such status, in this case as would entitle him to so proceed. Neither the corporation nor its stockholders could have inaugurated any such proceeding; therefore he could not. He is a mere trustee for those ultimately entitled to the assets of the corporation, whether creditors or stockholders, and does not represent the parties.

N. Y. P. & O. R. Co. vs. N. Y. L. E. & W. R. Co., 58 Fed., 268, 278;
Wilder vs. City of New Orleans, 87 Fed., 843, 848;
34 Cyc., 236-8.

He acquires no rights or interests other than those of the persons for whom he stands as trustee.

34 Cyc., 190-3, 388-9.

He is not a party to the suit entitled to litigate therein, and must be made a party formally when necessary and proper.

Youtsey vs. Hoffman, 108 Fed., 693, 695.

In that case it was held that an order permitting a Receiver to file an answer and set off was irregular and unauthorized. In the case of Receiver of State Bank vs. First Nat. Bk. of Plainfield, 34 N. J. Eq. 450, it was held that the Receiver of an insolvent bank could have no remedy by petition to recover monies of the bank, but must

proceed by formal suit. The court said that the fact that he was an officer of the court entitled him to no privilege not awarded to other suitors; that he must come by same process and prosecute in the same manner; that rules of practice are as much a law to him as to other suitors. In Wood vs. N. Y. & N. E. R. Co., 61 Fed., 236, the court dismissed, as not within the jurisdiction and contrary to equity procedure, a petition in the original suit filed by the receiver against the N. Y., N. H. & H. R. Co., for an order requiring them to cease a certain discrimination in rates and for injunction, etc., on the ground that the matter did not relate to the administration of the insolvent's estate but to a disputed claim made on behalf of that estate. In *ex parte* Hollis, 59 Cal., 405, it was held that the court had no control over the president of the insolvent corporation, who claimed adversely property which he was alleged to hold in fraud of creditors, and could not by a summary proceeding make him a party and adjudge his right to the property; that the remedy was by direct suit which the court should have instructed the Receiver to institute.

The supplementary proceeding in this case having been multifarious and improperly engrafted on the suit by the Receiver, it was the duty of the court *sua sponte* to have refused to consider it and to have relegated the Receiver to his remedy by proper action:

> M. & M. R. R. Co. vs. M. & St. P. R. R. Co., 6 Wallace, 742; 18 L. Ed., 856;
>
> Wash., Alex. & Georgetown R. R. vs. Mayor, Board of Aldermen and Common Council of Wash., D. C., 10 Wall., 299, 301; 19 L. Ed., 894.

In this latter case the court said as to an amended bill, filed without leave, notwithstanding there was no objec-

tion made, that it was a case of gross irregularity and such action should have been taken by the court as would have vindicated the rules of practice and regularity of proceeding. This conclusion is supported in the case of Kilbourn vs. Sunderland, 130 U. S., 505, 514; 32 L. Ed., 1005, 1009, cited by the trial court in its opinion in this case on the motion to strike; in which it was held that the objection of a remedy at law should have been interposed *in limine*, but intimated that it would have been otherwise had the bill been multifarious. Nothing should appeal more to a chancellor than the propriety of a strict enforcement of this rule. Otherwise every chancery suit would be burdened by any and every conceivable irregular proceeding on any possible theory of relation to it, irrespective of jurisdiction, and particularly in insolvency proceedings, which might be made the foundation of actions by and against a receiver, officers, stockholders, creditors and debtors *ad libitum*, as some of the cases already cited show.

11. THE REMEDY AT LAW.

It will be remembered that respondents on the call of the Receiver testified fully as to this transaction before Special Master Dent, on the settlement of Ambrose's accounts, and by that testimony, in connection with the records of the Title Company produced by the Receiver, full disclosure was made that the property purchased by respondents had been resold by them at a certain profit, so that the demand of the Receiver, if his report be treated as a demand, called for no equitable relief. There was no element of discovery, accounting, injunction, or the impressing of a lien or trust on property into which the profit converted. It was a certain and fixed money demand (R., p. 2), a purely legal demand not cognizable as such in Equity.

Townsend vs. Vanderwerker, 160 U. S., 171, 178; 40 L. Ed., 383, 385;

Scott vs. Neely, 140 U. S., 106, 110; 35 L. Ed., 358, 360;

Whitehead vs. Shattuck, 138 U. S., 146, 151; 34 L. Ed., 873.

Buzard vs. Houston, 119 U. S., 347, 352; 30 L. Ed., 451, 454;

Alger vs. Anderson Circuit Court, 92 Fed., 696, 710.

In Townsend vs. Vanderwerker it was said that where the object of a bill is the recovery of a pecuniary demand only, the remedy is at law. So in Whitehead vs. Shattuck, where the action is simply for the recovery of property, real or personal, or a money judgment. In N. Y. Guaranty & Indemnity Co. vs. Memphis Water Co., 107 U. S., 205, 214; 27 L. Ed., 484, 488, it was held that a Receiver, assignee of an equitable chose in action, could not, on the mere ground his interest was equitable, sue in equity, where his remedy at law was plain and adequate. In Greenwood & A. & W. Ry. vs. Strang, 77 Fed., 498, it was said that federal courts of equity have no jurisdiction to enforce a money demand only.

Assuming that discovery was sought, the rule is not changed in its application to this case. A prayer for discovery will not sustain the bill, unless discovery is actually necessary and actually made, where the remedy at law is adequate;

Russell vs. Clark, 7 Cranch 69, 89; 3 L. Ed., 271, 279;

Walker vs. Brown, 58 Fed., 23, 27;

or where the facts are proven by the plaintiff's own evidence, or plaintiff could have inspection of books and accounts at law under statutory provisions.

U. S. vs. Bitter Root Development Co., 200 U. S. 451, 471; 50 L. Ed., 550, 560.
D. C. Code, Sec. 1072.

The facts of this transaction were all proven by the evidence adduced by the Receiver in the main case and before demand on the respondents (R., pp. 44-53), so that no discovery was necessary.

Neither would the allegation of fraud in the transaction, unaccompanied by some other ground of equitable relief, give jurisdiction where the remedy at law is adequate.

Phoenix Mutual Life Ins. Co., vs. Bailey, 13 Wall., 616, 623; 20 L. Ed., 501;
Russell vs. Clark, *supra;*
Such vs. Bank of New York, 127 Fed., 450;
White vs. Boyce, 21 Fed., 228, 232;
Banque Franco-Egyptienne vs. Brown, 34 Fed., 162, 199;
Security Savings & Loan Association vs. Buchanan, 66 Fed., 799;
Curriden vs. Middleton, 37 App. D. C., 568;
Tyler vs. Moses, 13 App. D. C., 428, 442;
Johnson vs. Swankes, 107 N. W. (Wis.) 481; 5 L. R. A. (N .S.) 1048 and notes.

The recovery of money, under the theory of a constructive trust, from the persons charged with the trust is no exception to the rule above stated. The remedy is by *assumpsit* for money had and received.

Gaines vs. Miller, 111 U. S., 395, 398; 29 L. Ed., 466;
Nash vs. Ingalls, 101 Fed., 645;
Sigua Iron Co. vs. Clark, 77 Fed., 496;
George vs. Ford, 36 D. C. App., 315, 330;
Prescott vs. Pfeiffer, 57 Mich., 21;
Bay City Bridge Co. vs. Van Etten, *supra;*
Albright vs. Mercer, 15 Pa. Sup. Ct., 63;
McClane's Admx. vs. Shepherd's Ex'x., 21 N .J. Eq., 76;
German Am. Sem. vs. Kiefer, 43 Mich., 105;
Roberts vs. Ely, 113 N. Y. App., 128.

In Planters Bk. vs. Farm. & Mech. Bk., 8 G. & J. (Md.) 449, which was an action in assumpsit based on an alleged constructive trust, the court said the allegation of a trust would not prevent the bar of limitations.

But, notwithstanding the rule applied in these authorities, the learned judge of the trial court said in his opinion that there is a trust in this case (R., p. 34), and dismisses from his consideration the above cited case of Gaines vs. Miller on that ground. He ignored the language of the rule laid down in that opinion "whenever one person has in his hands money *equitably* (the italics are mine) belonging to another, that other person may recover it by *assumpsit* for money had and received," supported by authorities; and seized hold of the succeeding language in the opinion in that case "No trust is alleged, no discovery is sought." But the interpretation put upon this isolated quotation in the face of the preceding language and the succeeding language, was wrong. In that case land was sold by one Hammond, agent of the executors of a will, and the proceeds were converted by him to his own use. The suit was brought in equity by the beneficiary of the will, and the whole theory of the

bill was that in equity Hammond was constructively a trustee of the beneficiary. The prayer was that complainant be decreed to be *equitably entitled*. What this court undoubtedly meant by its language was that there was no subsisting *express* trust set up as ground for the jurisdiction; and that is borne out by the alternative suggested in the next sentence of the opinion: "The appellant has no lien on the property of Hammond's estate, and avers none"—the entire meaning being that there was no existing trust upon which to operate and no attempt to follow the money into any particular property of Hammond's and impress a trust upon it.

That the above is the true interpretation is borne out by the decision in George vs. Ford, above cited, and other authorities. In George vs. Ford the bill was for recission of a contract of sale of an interest in a corporation, between a director and stockholder on the one part and a director and manager on the other part. The court said, citing the principle as laid down in Buzard vs. Houston, *supra:*

> "Nor can the prayer that defendant be declared a trustee for plaintiff itself furnish a ground of jurisdiction; for there is no attempt to fasten a trust upon any particular piece of property into which the funds of plaintiff may be traced."

In the case cited, Buzard & Houston, this court said:

> "In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages where the like amount can be recovered at law in an action sounding in tort, or for money had and received."

The same line of reasoning is followed in other cases. In U. S. vs. State Nat. Bank of Boston, 96 U. S., 30, 24 L. Ed., 647, it was said that the interposition of equity was not necessary where a trust fund was perverted; the *cestui* can follow it at law. In Mills vs. Knapp, 39 Fed., 595, Mr. Justice Blatchford indicates it clearly, showing that the ground of equitable relief is not the mere allegation of a constructive trust in the fund sought. That was a suit to recover from an agent profits on stock bought for the principal but taken in the agent's name and he said: "The face of the bill has a plain, adequate and complete remedy at law. He declares in his bill the amount he is entitled to recover. He asks for no discovery. He shows that no accounting under the direction of the court is necessary, for he makes the accounting in his bill. No other equitable relief is asked." In Shields vs. McCandlish, 73 Fed., 318, plaintiff filed a bill for rescission and claimed a specific sum of which her agent defrauded her by purchasing a bad security, and it was held a mere money demand cognizable at law. In New Hampshire Sav. Bk. vs. Richey, *supra*, it was held that directors could not be held as constructive trustees for rents of a mortgaged property of the corporation diverted in dividends to themselves, on the ground that they constituted a trust fund.

In Angle vs. Chi., St. P., M. & O. R. Co., 151 U. S., 1, 26, 38 L. Ed., 55, 67, the distinction is shown that the remedy is in Equity when the fund is followed into other hands or property for the purpose of impressing a trust upon it ,not where it is sought to be recovered direct from the alleged wrong-doer.

In Tyler vs. Moses, 13 D. C. App., 428, 442, cited by the trial justice on this point, and which was a case of cancellation of contract, it was said, citing Buzard vs. Huston:

"If the question turned merely upon the right of either Moses or Fleming to recover the money paid to defendant through reliance upon his fraudulent misrepresentations and concealments, *uncomplicated by the partnership agreement* in respect of the purchase and holding of the option stock, there would be no doubt that the action is one of which a court of equity ought not to have taken jurisdiction. (Italics mine.) Where a judgment for permanent damages would answer all the claims of the parties and is the only redress which the plaintiff seeks or could have, the remedy at law is exclusive."

This shows the case was held solely on the equity jurisdiction of cancellation with respect to the partnership contract.

In Banque Franco-Egyptienne, *supra*, the court said that if the suit was brought against *the immediate recipients* of the money the remedy would be at law; otherwise if it had passed into the hands of others.

Finally the principle that the mere allegation of a constructive trust will not support jurisdiction in equity in the face of a remedy at law, is explained in England vs. Russell, 71 Fed., 818, 825. That was a bill to set aside a conveyance in fraud of creditors, on the theory that the grantees were constructive trustees, and the court in dismissing the bill, the creditors' claims not having been reduced to judgment, said: *"A trust does not arise out of a fraudulent transfer at the time of the transaction. It only arises after the adjudication vacating the conveyance on the ground of fraud."*

From the foregoing decisions the principle appears plain. Equity jurisdiction is not invoked by the mere theory of a constructive trust in the transaction, but by there being an existing trust in fact or an effort to have

property of the persons sought to be charged and into which the money was converted impressed with a trust. There is no trust in the money or profits for which the persons sought to be charged may be liable as mere debtors.

Notwithstanding the remedy of the Receiver at law was plain and adequate, requiring no exercise of power on the part of equity to supplement it, the trial justice held that the objection on this ground was interposed too late, citing certain well recognized cases in this court in support of his opinion. In applying to the case now on review the rule laid down by the cases cited in his opinion that this objection must be made *in limine*, the trial justice apparently overlooked another equally well recognized line of cases in this court applicable to this case, while the ones he cited are not applicable. From a comparative analysis of the two lines of decisions, both harmonious, it will be seen that the objection need only be taken *in limine* where the case presents some ground for the exercise of the powers of a court of equity to grant equitable relief. Where the case does not call for the granting of equitable relief, the objection should be noticed by the court *sua sponte*, even though not pleaded, raised by demurrer or noticed by counsel, and the bill dismissed. Leading cases cited by the trial justice are Reynes vs. Dumont, 130 U. S., 354, 395; 32 L. Ed., 934, 945, followed in Kilbourn vs. Sunderland, 130 U. S., 505, 514; 32 L. Ed., 1005, 1009; and Brown vs. Lake Superior Iron Co., 134 U. S., 530, 536; 33 L. Ed., 1021, 1025 (R., p. 29). Leading cases laying down the other rule above stated are Lewis vs. Cocks, 23 Wall., 466, 470; 23 L. Ed., 70, which was a bill to set aside a foreclosure sale, followed in Allen vs. Pullman Palace Car Co., 139 U. S., 658, 662, 35 L. Ed., 303, 305.

The distinction between these two rules has been broadly laid down in some opinions in which the question has been considered, while in others it has been more specifically defined. In some it has been stated that the objection must be raised *in limine* if the case is of a class of which equity has jurisdiction, and in others where the subject matter is jurisdictional in equity. The specific distinction, however, will be found to be, upon an analysis of all of the cases, that if the bill calls for the granting of any equitable relief, notwithstanding there is a remedy at law, the objection must be raised *in limine;* but if, on the other hand, no equitable relief whatsoever is necessary, the demand being wholly legal and remediable at law, the jurisdiction must be denied.

In Reynes vs. Dumont, it was held the rule requiring the objection to be raised *in limine* applied "where the subject matter belongs to a class over which a court of equity has jurisdiction;" in Kilbourn vs. Sunderland, "where it is competent for the court to grant the relief sought and it has jurisdiction of the subject matter." In Brown vs. Lake Superior Iron Co., *supra,* both of the above cases were followed. From an examination of these cases it will be seen that in two of them, Reynes vs. Dumont and Kilbourn vs. Sunderland, the jurisdictional subject matter relied on for retaining them was the necessity of an accounting; and in Brown vs. Lake Superior Iron Co., there was a receivership of an insolvent corporation which had been continuing for many months. In Hollins vs. Briarfield Coal and Iron Co., *supra,* the court, following the above, rested the decision on the same grounds as in Brown vs. Lake Superior Iron Co. In Reynes vs. Dumont and Brown vs. Lake Superior Iron Co. the court specifically stated it rested the decision on the circumstances of the case, showing that it was not the purpose to hold the rule general and contrary to the

rule laid down in Lewis vs. Cocks, which case was discussed in the opinions and not controverted, saying also that the rule that such objection must be made *in limine "must be taken with the qualification* that it is competent for the court to grant the relief sought and that it has jurisdiction of the subject matter."

On the other hand, in both Reynes vs. Dumont and Brown vs. Lake Superior Iron Co., the court states the general rule to be as held in Lewis vs. Cocks, that "if the court, upon looking at the proofs, found *none at all of the matters* which would make a proper case for equity, it would be the duty of the court to recognize that fact and give it effect, though not raised by the pleadings or suggested by counsel;" and this was followed in Allen vs. Pullman Palace Car Co., which was later than all of the cases above referred to. This general rule is well stated in Hotel Co. vs. Electric Lighting Co., 17 D. C., App. 356, 365, in which it was said:

> "If upon review of the case as presented by the complainant it appears that there is nothing in the case that justifies the exercise of equity jurisdiction it is the duty of the court to recognize the fact and to give it effect, even though the question be not raised in the pleading or suggested in the argument of counsel."

In Pechstein vs. Smith, 14 D. C. App., 27, 30, the distinction is stated more specifically thus:

> "The mere assertion of an equity is not sufficient to sustain the bill, but the case as stated in the bill must show sufficient equity by the allegation of facts to satisfy the court that there is an *equitable element involved that will not be available or can not be availed of as a defense in an action at law."* (Italics mine.)

The distinction between these two lines of decisions, the leading cases in which have been frequently followed, is specifically pointed out and discussed in the case of Mills vs. Knapp, *supra* (opinion by Mr. Justice Blatchford), holding that it was not competent for a court of equity to grant the relief asked—a decree against a fiduciary for a specific sum of money converted in fraud; and he said that in such a case it was not necessary that the objection should be taken *in limine*. It was again pointed out and discussed and the same application made in Hoey vs. Coleman, 46 Fed., 221, and in Guarantee Co. vs. Mechanics' Sav. Bk. and Trust Co., 80 Fed., 766, 771. Even where it has been held that the objection to the jurisdiction must be raised *in limine*, it has not been on the ground of any waiver of right in the proceedings below, but on the ground that it was within the discretion of the Appellate Court to refuse to consider the question where there was ground for holding the case in Equity.

Reynes vs. Dumont, *supra;*
Tyler vs. Savage, 143 U. S., 79, 94; 36 L. Ed., 82, 89.

All of the decisions on this question are harmonious, and the test of their application is well defined. It may be almost said to be nothing more than a re-statement of the rule of "the remedy at law" itself—that is, if the remedy at law is plain, adequate *and complete* equity will not take cognizance of the case; but if the remedy at law, while plain, is not adequate and effective and the case requires some equitable relief to make the remedy adequate and effective, then equity will consider it.

It has already been pointed out that fraud alone, unaccompanied by equitable relief on some other ground, will not sustain the jurisdiction. It has also been pointed

out that no other equitable relief is asked in this case, neither injunction, accounting nor discovery. Neither was there any existing trust out of which the transaction grew; nor any property involved upon which it is sought to impress a trust. It has further been pointed out that constructive fraud, or a constructive trust *as such*, like actual fraud, is not ground for equitable relief unaccompanied by any other ground for equitable relief. In this connection, and as supporting this view, attention will be called to the universal rule of applying limitations to a constructive trust, thereby treating it from the legal standpoint.

It is apparent, therefore, in this case that there is "no trace in it of ground for equitable jurisdiction," as was said in Guarantee Co. vs. Mechanics' Sav. Bk. & Trust Co., *supra*, which case was held solely on the ground of a complicated accounting. The case was held on the same ground in Hayden vs. Thompson, 71 Fed., 60. In other words, the lack of jurisdiction was apparent on the face of the proceeding, and in such case it is the duty of the court *sua sponte* to notice it and dismiss the bill, even where the objection is not made by plea or demurrer or suggested by counsel.

Hipp vs. Babin, 19 How., 271, 278; 15 L. Ed., 633, 635;
Sullivan vs. Portland & Kennebec R. Co., 94 U. S., 806; 24 L. Ed., 324;
Curry vs. McCauley, *supra;*
White vs. Boyce, *supra;*
Mills vs. Knapp, *supra;*
Walker vs. Brown, 58 Fed., 23, 25.

And it makes no difference whether the question be raised in the lower court or not, the Appellate Court may and

must notice it, and if the lack of jurisdiction is apparent it will reverse the decree and direct the dismissal of the bill, because the jurisdiction must affirmatively appear from the facts upon which it depends:

Wylie vs. Coxe, 15 How., 416, 420; 14 L. Ed., 753;
Tyler vs. Savage, *supra;*
Mattingly vs. Northwestern Va. R. Co., 158 U. S., 53, 57; 39 L. Ed., 894;
Parker vs. Ormsby, 141 U. S., 81, 83; 35 L. Ed., 654;
Metcalf vs. Watertown, 128 U. S., 586; 32 L. Ed., 543;
Continental Life Ins. Co. vs. Rhoads, 119 U. S., 237; 30 L. Ed., 380;
Southern Pacific R. Co. vs. U. S., 200 U. S., 341, 349; 50 L. Ed., 507, 510;
Koenigsberger vs. Richmond Silver Min. Co., 158 U. S., 41, 46; 39 L. Ed., 889, 890;
McGowan vs. Elroy, 28 D. C. App., 188, 196;
Pechstein vs. Smith, *supra.*

III. THE STATUTE OF LIMITATIONS.

In the opinion of the trial court considering the question of lapse of time, the court clearly intimates (R., 29-30) that the case should be held in equity if the statute of limitations applied, because in that case it would be barred at law; and the court as clearly intimates that if limitations do not apply because of the trust relation, then equitable jurisdiction attaches because of the trust relation; and these very intimations of the trial justice show that he had in mind the distinction I have already pointed out between an express trust which would afford ground

for the exercise of equity jurisdiction, and the constructive trust which would not of itself alone do so. The law is well settled that limitations do not run in the case of an express trust till it be repudiated by the trustee, while in the case of a constructive trust or constructive fraud they run from the time of the transaction or knowledge of the transaction, just as they run in an action at law for fraud or deceit. The analogy is perfect and the rule is harmoniously applied, and accentuates the distinction heretofore pointed out in respect to the objection of a remedy at law. The remedy may be at law for a constructive fraud as for an actual fraud, though the form of the action is different. For actual fraud the action would be in deceit, because the verdict and judgment must be for compensatory damages. For constructive fraud the action would be as pointed out in *assumpsit*, because the recovery would not necessarily be damages the essential of an action of deceit, but the gain to the person charged. On the other hand the remedy may be in equity if some relief is requisite in equity not obtainable at law, and other than a decree for money alone.

Lapse of time has been variously treated in equity, sometimes as laches, sometimes by analogy to limitations, and sometimes by the direct application of the statute of limitations. In cases of constructive trust, however, courts of equity, when necessary to assume jurisdiction, universally apply the legal rule of limitations.

Boone vs. Chiles, 10 Pet. 177, 223; 9 L. Ed., 388, 404;

Beaubien vs. Beaubien, 23 How., 190, 207; 16 L. Ed., 484, 488;

Speidel vs. Henrici, 120 U. S., 377, 386; 30 L. Ed., 569;

Norris vs. Haggin, 136 U. S., 386, 390, 392; 34 L. Ed., 424, 426, 427;
County of Boone vs. Burlington & Mo. River R. Co., 139 U. S., 684, 692; 35 L. Ed., 319, 322;
Alsop vs. Riker, 155 U. S., 448, 460; 39 L. Ed., 218, 222;
Percy vs. Cockrill, 53 Fed., 872, 876;
Scheftel vs. Hays, 58 Fed., 457, 460;
Merrill vs. Town of Monticello, 66 Fed., 165 167;
Miles vs. Vivian, 79 Fed., 848, 853;
Nash vs. Ingalls, *supra;*
Hall vs. Russell, 3 Sawy., 506;
Hecht vs. Slaney, 72 Cal., 363;
McGaughey vs. Brown, 46 Ark., 25;
Pipe vs. Smith, 5 Colo., 146;
Wilmerding vs. Ross, 33 Conn., 67, 77;
Maxwell vs. Walsh, 117 Ga., 467;
McClane's Admx. vs. Shepherd's Ex'x, *supra;*
Farnham vs. Brooks, 9 Pick, 212, 243;
German Am. Seminary vs. Kiefer, *supra;*
Weaver vs. Leiman, 52 Md., 708;
Marcotte vs. Hartman, 46 Minn., 202;
Yeoman vs. Townshend, 74 Hun., 625;
Roberts vs. Ely, *supra;*
Lammer vs. Stoddard, 103 N. Y., 672;
Talmadge vs. Russell, 76 N. Y. Sup., 854;
Davis vs. Hawkins, 163 Pa., 228;
Ashurst's Appeal, 60 Pa., 290, 316;
Watts' Appeal, 78 Pa., 370;
Newman vs. Newman, 60 W. Va., 371; 7 L. R. A., 370 and notes;
Merton vs. O'Brien, 117 Wis., 437.

Why, therefore, did not the trial court consider the question of limitations and apply it? A remedy barred at law is barred in Equity and will not be revived in Equity:

> Carroll vs. Green, 92 U. S., 509; 23 L. Ed., 738;
> Ware vs. Galveston City Co., 111 U. S., 170, 175; 28 L. Ed., 393;

The time from which the limitations run will be discussed under the head of laches, in connection with the rules of discovery, diligence, negligence, inquiry, etc. The elapsed time in this case was five years, and the three-year period of limitations applies.

The fact that the claim was barred at law was therefore no ground for straining to hold and exercise equity jurisdiction, which will not avail to avoid the bar, but rather a reason why the trial court should have considered and applied the limitations which it did not overlook, as limitations are binding on courts of equity.

> Stearns' Adm'r vs. Page, 7 How., 819, 828; 12 L. Ed., 928, 932;
> Wagner vs. Baird, 7 How., 234, 258; 12 L. Ed., 681, 691;
> Burke vs. Smith, 16 Wall., 390, 401; 21 L. Ed., 361, 365;
> Meath vs. Phillips Co., 108 U. S., 553; 27 L. Ed., 819;
> Wood vs. Carpenter, 101 U. S., 135, 138; 25 L. Ed., 807, 808;
> Norris vs. Haggin, 136 U. S., 386, 390, 392; 34 L. Ed., 424, 426, 427;
> Teall vs. Schroeder, 158 U. S., 172, 178; 39 L. Ed., 938, 940;
> Baker vs. Cummings, 169 U. S., 189, 206, 209; 42 L. Ed., 711, 718, 719;

Lewis vs. Dennison, 2 D. C. App., 387;
Sheehy vs. Eastern Imp. & Mfg. Co., 44 D. C. App., 107, 111.

IV. LACHES.

But treating this case as one of equitable cognizance, because of a trust, still the court below should have considered the question of laches in its application to this case, either as such or by the analogy of limitations, for it was apparent on the face of the Receiver's report. The transaction complained of was accomplished in June-August, 1910 (R., 6-7). The Receiver's report setting up the claim was filed January 28, 1916 (R., 1), though the facts were disclosed in the hearings before Special Master Dent a few months before (R., 50, 53), his report having been filed December 6, 1915 (R., 43). The rule of laches or lapse of time itself need not to be discussed here beyond the reference to a few of the many cases stating the underlying principle,—the lack of reasonable diligence or the neglect for an unreasonable time to assert rights. In Elmendorf vs. Taylor, 10 Wheat., 146, 152, 6 L. Ed., 289, 294, the court said that "from the earliest ages courts of equity have refused their aid to those who have neglected for an unreasonable length of time to assert their claims." In Bowman vs. Wathen, 1 How., 189, 193, 11 L. Ed., 97, 99, the court quoted as the rule the language of Lord Camden:

> "That a court of equity, which never is active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept on his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing."

The rule of diligence and the principle that the rule was for public tranquillity, the peace and welfare of society, and the protection of acquired rights long unassailed or acquiesced in, is also enunciated in the following cases:

McKnight vs. Taylor, 1 How., 161, 168; 11 L. Ed., 86, 88;
Creath's Admr. vs. Sims, 5 How., 192, 204; 12 L. Ed., 111, 117;
Twin Lick Oil Co. vs. Marbury, 91 U. S., 587; 23 L. Ed., 328;
Brown vs. County of Buena Vista, 95 U. S., 157, 161; 24 L. Ed., 422;
Hayward vs. Elliot Nat. Bk., 96 U. S., 611, 618; 24 L. Ed., 855, 858;
Hammond vs. Hopkins, 143 U. S., 224, 250; 36 L. Ed., 134, 145;
Fowler vs. Fowler, 38 D. C. App., 476;

And fraud will not relax the rule; it is immaterial:

Bowman vs. Wathen, *supra;*
Upton vs. Tribilcock, 91 U. S., 45, 54; 23 L. Ed., 203, 207;
Godden vs. Kimmel, 99 U. S., 201, 210; 25 L. Ed., 431;
Jones vs. Perkins, 76 Fed., 82, 84.

Some of the decisions lay stress on gross negligence of persons charging fraud in informing themselves, as influencing the court to bar relief:

Wagner vs. Baird, *supra;*
Sullivan vs. Portland & Kennebec R. Co., *supra;*
Simmons Creek Coal Co. vs. Doran, 142 U. S., 417, 437; 35 L. Ed., 1063, 1072;

Abraham vs. Ordway, 158 U. S., 416, 422; 39 L. Ed., 1036, 1039;
Taylor vs. Holmes, 14 Fed., 498, 517.

There can be no question of the gross negligence of the stockholders in this litigation and in every step in connection with it. The bill was filed in 1908 and but 30 stockholders actively participated in the beginning, out of 600 (R., 40). Of these 430 were non-borrowing, and a year after, in 1909, only 328 of these responded to the public advertisement of the Receiver (R., 41). The former Receiver's activities ceased practically in 1911 (R., 41). For the four years thereafter the only persons who took any part in the litigation were the creditors of the defendant company (R., 42-4). During this period none of the counsel who appeared for the stockholders originally filing the bill and intervening interested himself in the litigation, except Mr. Sullivan, who represented some of them; and up to the present time even none of the counsel has interested himslf, except Mr. Sullivan (R., 45, et seq.). The Receiver was not called upon for any accounting. His account was only filed, in compliance with the new 73rd Rule, on call of the Clerk of the Court in 1914 (R., 42). His peculations were disclosed by the Auditor of the Court on an examination of that account (R., 42), and could have been as readily discovered by the stockholders or their counsel in the cause had they been interested enough to investigate. This was four years after the transaction now here in question (1910). Even then nothing was done for a year, when the Receiver was forced out by resignation because of the disclosures by the Auditor and while the Auditor was holding the reference pending examination and production of evidence as to the details and extent of the peculations (R., 43). The whole history of

the case shows that the stockholders and their counsel had abandoned the litigation as probably unproductive and not warranting the expense of pursuing it, in view of the fact that the claims of the two sets of creditors largely exceeded the fund in sight, and in view of the probable absorption of all funds that might be secured, as subsequently developed, by the expense of administration and the satisfaction of the claims of those creditors (R., 72-74). The present Receiver's petition was filed in 1916, nearly six years after the transaction complained of, and during that period none of the stockholders or counsel representing them took a single step or made a single inquiry towards obtaining information as to this or any other transaction of the Receiver; although for the last two years of the period the peculations of the former Receiver were notorious, culminating in his indictment and trial; and notwithstanding, as the facts were ultimately disclosed, they could have been readily ascertained at the very time of the transaction in 1910 by inquiring of the auctioneer who made the sale. In Willard vs. Wood, 164 U. S., 502, 525, 41 L. Ed., 531, 540, the court said that failure in diligent prosecution after suit brought would call for the application of the rule of laches.

Now the duty of one charging fraud, as to knowledge and inquiry, is well settled in the law; and what constitutes knowledge on his part, or what charges him with knowledge, in order to avoid the defense of laches, is equally well settled. Mere ignorance does not avail him.

> McQuiddy vs. Ware, 20 Wall., 14; 22 L. Ed., 311;
> Marsh vs. Whitmore, 21 Wall., 178, 185; 22 L. Ed., 482, 485;

which was the case of an attorney purchasing his client's property through the medium of a third party;

Kieley vs. McGlynn, 21 Wall., 503, 518; 22 L. Ed., 599, 605.

In Halstead vs. Grinnan, 152 U. S., 412, 417, 38 L. Ed., 495, 497, the court said that ignorance the result of indifference would not excuse laches.

Means of obtaining knowledge is equivalent to knowledge.

Hoyt vs. Latham, 143 U. S., 553, 565, 569; 36 L. Ed., 259, 265;

Pearsall vs. Smith, 149 U. S., 231, 234; 37 L. Ed., 713, 716;

Credit Co. vs. Arkansas Central R. Co., 15 Fed., 46, 53;

Teall vs. Slaven, 40 Fed. 774, 780, followed in Naddo vs. Bardon, 47 Fed., 782, 789;

both of which were cases of attorney or agent purchasing property of clients through third persons;

Jessup vs. Ill. Cent. R. Co. 43 Fed., 483, 504;

Dugan vs. O'Donnell, 68 Fed., 983, 992;

U. S. Trust Co. vs. David, 36 D. C. App., 549.

But the rule goes farther. Where the means of knowledge are available, the person claiming to be defrauded is put upon inquiry to obtain that knowledge, and if he fails to make the due inquiry he is charged with knowledge of all the facts which might reasonably have been discovered had he used the ordinary care which any prudent man should exercise under the dictates of his own interest;

Burke vs. Smith, 16 Wall., 390, 401; 21 L. Ed., 361, 365;

Johnston vs. Standard Mining Co., 148 U. S., 360, 370; 37 L. Ed., 480, 485;

Pearsall vs. Smith, *supra;*
Taylor vs. S. & N. Ala. R. Co., 13 Fed., 152, 159;
Rugan vs. Sabin, 53 Fed., 415, 420;
Lewis vs. Dennison, 2 D. C. App., 387;
Demares vs. Gilpin, 15 Colo., 76, 84.

In Hendrickson vs. Hendrickson, 42 N. J. Eq. 657, the court said:

> "In cases of implied trust relief is refused to parties who come into a Court of Equity after long acquiescence, and that not only in circumstances where the length of time would render it difficult to ascertain the true state of the fact, but also where the true state of the fact is easily ascertained and where it is perfectly clear that relief would originally have been given."

This is especially true where the transaction is public and a matter of record; and persons involved are available for inquiry:

Harwood vs. C. & C. A. L. R. Co., 17 Wall., 78; 21 L. Ed., 558;
County of Boone vs. Burlington & Mo. River R. Co., 139 U. S., 684, 693; 35 L. Ed., 319, 322;
Foster vs. Mansfield, C. & L. M. R. Co., 146 U. S., 88, 100; 36 L. Ed., 899, 903;
Evers vs. Watson, 156 U. S., 527, 535; 39 L. Ed., 520, 523;
Teall vs. Schroeder, *supra;*
Taylor vs. S. & N. Ala. R. Co., *supra;*
Rhino vs. Emery, 65 Fed., 826, 835;
Lant vs. Manley, 71 Fed., 7, 19;
Lewis vs. Kengla, 8 D. C. App., 230;
Barton vs. Long, 45 N. J. Eq. 841.

In Marcotte vs. Hartman, *supra*, it was held that knowledge of a foreclosure under a power was presumptively sufficient to put the mortgagor on inquiry as to the regularity of the proceedings, and limitations were applied in a suit to set aside. In Morrell vs. Trotter, 15 Phila., 201, case of a purchase by a pledgee, the court barred the suit because the pledgor had knowledge of the sale and its results, though ignorant of the purchaser. In Vigoreaux vs. Murphy, 54 Cal., 346, the court said that knowledge of the judgment, execution and advertisement of sale were equivalent to knowledge of the sale and constructive notice of the fraud, and the case was held barred after three years' delay.

Nor does mere concealment by silence on the part of the person charged relieve the person charging from the duty of inquiry. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry, some hindrance or impediment.

Johnson vs. Atlantic, G. & W. I. Transit Co., 156 U. S., 618, 647; 39 L. Ed., 556, 566;
Felix vs. Patrick, 145 U. S., 317, 329; 36 L. Ed., 719, 725;
Hammond vs. Hopkins, *supra;*
Wagner vs. Baird, *supra;*
Lant vs. Manley, *supra;*

In Leavenworth Co. vs. Chic. R. I. & P. R. Co., 18 Fed. 209, the court said:

> "To take advantage of the exception provided for in a case of concealed fraud, where otherwise the party would be barred by reason of laches or the statute of limitations, it must be made to appear that the fraudulent transaction from which relief is prayed was one which concealed itself, or

at least the allegations and proof must be such as to satisfy the court that the complainant could not have known of the facts constituting the fraud by the exercise of proper diligence and care."

Moreover, any fact which will excite suspicion or attention, any clue to the transaction, is sufficient to charge the person alleging fraud with knowledge of all that inquiry might lead to:

Norris vs. Haggin, 28 Fed., 275, 280, affirmed by this court, *supra;*
Percy vs. Cockrill, *supra;*
Swift vs. Smith, 79 Fed., 709, 713;
Teall vs. Slaven, *supra;*
DeWalt vs. Doran, 21 D. C., 163, 175.

Testing this transaction in the light of the foregoing principles, what is the inevitable conclusion? The Receiver of the defunct defendant building association was charged with the duty of collecting debts due to it secured by deeds of trust; in doing so to call on the trustees in the deeds of trust to sell under their powers; and to attend such sales and see that they were fairly made. In pursuance of his duties, the Receiver called on the trustee to sell the parcel involved in the transaction in question. The trustee, on this call, advertised the property and in pursuance of this advertisement made the sale and Wilson purchased, the Receiver and one of his attorneys, Smith, attending the sale. (R. 6-7). Wilson was a well known member of the bar, and his relations with the Receiver and Smith were no doubt also well known to the parties interested in the litigation, certainly to the attorneys for those stockholders represented in the litigation. The agreement by which Smith and Ambrose were to become interested with Wilson, *after and in the*

event of his purchase, was openly made in the presence of the auctioneer and was in fact made upon the suggestion or opinion of the auctioneer at the first attempted sale (R., 6-7). A day or two after the sale Smith communicated with several real estate men, including his clients Allen E. Walker & Co., relative to procuring a purchaser (R., 7). When the re-sale was made the deeds to and from Wilson were placed on record (R., 7-8). Upon the coincident settlements of both sales by the title company (R., 7), the check for the net profit made to Wlison by the title company was endorsed by him, by Ambrose and by Smith (R., 45, 47, 52).

Now at the very moment of the transaction we find as a clue to it or as a fact sufficient to excite suspicion or attention, the relation of Wilson to his fellow members of the bar, Ambrose and Smith. We find further that there was no concealment by Smith or Ambrose of their interest in the matter, and no hindrance or impediment contrived by them to exclude suspicion or prevent inquiry. We find also that instead of Wilson assigning his purchase, as he might have done, if there was any intention of concealment or prevention of inquiry, he took title and passed it openly on the public records, after having purchased at a public sale effected upon public advertisement. We find that the stockholders and their attorneys, who were so indifferent to the litigation during the succeeding years that the Receiver was enabled to embezzle the entire assets, amounting to ovr $50,000, viz, $33,889.39 plus $17,011.63, the former of which amounts was furnished by his surety to enable him to account in 1914, and the latter of which was surcharged by the Master in 1915 (R., 43, 73), never interested themselves to make any inquiry about this sale, as their interest required them to do. We find that if they had

made inquiry the means of knowledge were available to them. The auctioneer Weschler knew all about it; Allan E. Walker & Co. knew of Smith's connection; the Title Company's check would have disclosed the whole matter in 1910 as it did in 1915. And the means of knowledge being available in 1910 at the time of the transaction, the stockholders, their attorneys of record, and their representative now, the present Receiver, are chargeable with knowledge in 1910. Both laches and limitations are therefore a bar, either or both, for the demand was not made until 1915.

The length to which a court will go to apply the rule of laches in such event is well shown in the case of Naddo vs. Bardon, 51 Fed., 493, 500. Justice Brewer, speaking of a purchase by an agent of his principal's property, said that he would not say there was no breach of duty; and while the agent's conduct if challenged promptly would have been the subject of condemnation, it was not such gross and outrageous fraud as would long years after outweigh the laches of plaintiff. Again in McMonigle vs. McGlinn, 85 Fed., 88, 92, a case where an attorney committed a gross fraud by converting the money of his client, concealed the fraud and lulled the client into security by false representations because of which she sought no advice and made no inquiry. She sued 12 years after to recover the money and impress a trust on property purchased with the money and standing in the name of the attorney's wife. The court applied limitations in bar. I have already cited many cases following this rule, some of them of periods but little longer than the three year period of limitations, and approximating the period in this case, more or less, some for periods shorter than limitations and barred for gross laches.

As the laches were apparent on the face of the Receivers' report (R., p. 2), it was the duty of the court to consider and apply them on the hearing of its own motion:

Richards vs. Mackall, 124 U. S., 183, 188; 31 L. Ed., 396, 399;
Sullivan vs. Portland & Kennebec R. R., *supra;*
Willard vs. Wood, 164 U. S., 502, 525; 41 L. Ed., 531, 540;
Leavenworth Co. vs. Chicago R. I. & Pac. Ry. Co.; 18 Fed., 209;
Lakin vs. Sierra Buttes Gold Mining Co., 25 Fed., 337, 344;
Commissioners vs. Seymour, 71 Wis., 340, 346.

And it is not necessary to set them up by plea, answer or demurrer.

Richards vs. Mackall, *supra;*
Penn. Mutual Life Ass'n. vs. Austin, 168 U. S., 685, 696; 42 L. Ed., 626, 631;
Credit Co. vs. Arkansas Central R. Co., 15 Fed., 46, 55;
Leavenworth Co. vs. C. R. I. & P. R. Co., *supra;*
Lakin vs. Sierra Buttes Gold Mining Co., *supra;*
James vs. James, 55 Ala., 525, 533.

The trial justice, notwithstanding the fact of lapse of time was in his mind in writing the opinion (R., 29-30), wholly ignored this rule, while insisting on the right of equity to retain the case in face of the remedy at law and the bar of limitations, and in face of the further fact that the Receiver showed no excuse for the delay and lack of diligence. Inasmuch as the court below failed to consider laches, it was in the discretion of

tended to prevent inquiry or knowledge, on the part of the persons charged, time when discovery made, and the discovery not made sooner, but there was absolutely no pleading whatsoever. Yet the court, though it noticed the laches and the bar of limitations (R., 29, 30), not only made no requirement of the Receiver to compel a compliance with the rule, but in effect insisted upon the respondents meeting a bare statement of the facts of the sale and resale and a legal conclusion of the Receiver, which they denied, and submitting to a jurisdiction which the court did not have the right to exercise.

CONCLUSIONS.

1. In the posture of the parties there was nothing to prohibit the purchase by Ambrose, so long as he did not prejudice the rights of the building association, that is so long as the sale was not controlled or interfered with by him; and as Ambrose's purchase, treating his participation as such, was made under these circumstances, there was no betrayal of confidence, no breach of duty, and he cannot be held as a constructive trustee.

2. Whether Ambrose could be held as such trustee or not, Smith and Wilson cannot be so held; for there was no joint actual fraud, for which all could be held jointly or each severally to the extent of a single satisfaction, and Smith and Wilson were not in such fiduciary relation and therefore under no such prohibition as would make them constructive trustees, and Ambrose's participation with them could not make their acts the constructive fraud on their part which it was not. Only actual fraud on the part of Ambrose, with their knowledge and participation, could taint the transaction so far as they were concerned.

3. The Receiver has shown no right to the proceeds of sale in question on the part of the building association.

4. The decree was improper because predicated on the principles of law applicable to cases of actual fraud, especially as to joint liability, instead of on the principles of law applicable to constructive fraud, as to which the sole test is the relation and the breach of duty, in the absence of which there can be no trust.

5. The decree was improper because it was a plural decree, a plural judgment, against several parties held jointly liable, and was barred by the election to take a previous several decree against another party held jointly liable with them.

6. The recovery, even if there were a right, should not be decreed ostensibly for the benefit of those for whom the right to claim it is asserted, when in fact it is to be diverted for expenses of administration and attorneys' fees.

7. The allowance of interest on the recovery is inequitable.

8. The claim was not cognizable in equity in the form presented; because it was multifarious, misjoining both subject matters and parties.

9. The claim was not cognizable in equity, because no equitable relief is demanded and there was a complete remedy at law.

10. The claim is barred by limitations.

11. The claim is barred by laches.

12. The claim is not cognizable in equity because it was not pleaded in accordance with the strict requirements of equity.

On the merits, it appears incontrovertible that the Court of Appeals of the District of Columbia correctly

the Appellate court, and it was its duty, to raise the question of its own motion.

Crutchfield vs. Hewitt, 2 D. C. App., 373.

V. FAILURE OF RECEIVER TO PLEAD STRICTLY.

The rule is that when fraud is alleged and delay in the assertion of the rights infringed is apparent on the face of the bill, plaintiff must plead strictly, setting forth the impediments to earlier prosecution, in order to excuse delay and escape the enforcement by the court of the bar of laches, and the dismissal of the bill.

Stearns vs. Page, *supra;*
Beaubien vs. Beaubien, 23 How., 190, 208; 16 L. Ed., 484, 488;
Badger vs. Badger, 2 Wall., 87, 95; 17 L. Ed., 836, 838;
Harwood vs. C. & C. A. L. R. Co., 17 Wall., 78; 21 L. Ed., 558;
Wollensak vs. Reiher, 115 U. S., 96, 102; 29 L. Ed., 350, 352;
Ware vs. Galveston City Co., 146 U. S., 102, 115; 36 L. Ed., 904, 909;
Hardt vs. Heidweyer, 152 U. S., 547, 558; 38 L. Ed., 548, 552;
Taylor vs. Holmes, 14 Fed., 498, 517;
Jones vs. Perkins, 76 Fed., 82, 84;
Thompson vs. German Ins. Co., 77 Fed., 258, 262;
Hubbard vs. Manhattan Tr. Co., 87 Fed., 51, 59;
Fowler vs. Fowler, *supra;*

The language of many of these decisions is "the particular acts of fraud or concealment should have been set

forth by distinct averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been made before," in order that limitations or laches be avoided, as they may apply respectively. In Quirk vs. Liebert, 12 D. C. App., 394, it was held that the pleadings should show impediments to early prosecution, means used to deceive, and how plaintiff so long ignorant, so that the court could determine whether there were laches, of which delay raised the presumption. In Manley vs. Lant, 71 Fed., 7, 19, the court said that the party seeking relief after a long time against an alleged concealed fraud must plead specifically what were the impediments to an earlier prosecution of his claims, how he came to be so long ignorant of his alleged rights, the means used by defendant to keep him in ignorance, and how he first came to a knowledge of the right. In Wetzel vs. Minn. Ry. Transfer Co., 65 Fed. 23, 26, the court said that the rule that a suitor must plead and prove some adequate excuse for his silence and inaction in every instance where there has been an apparent want of diligence, *is applied and enforced with great strictness in those cases where a person seeks to fasten upon another a constructive trust with respect to real or personal property.* (Italics mine.) And in this principle we find one reason for the lack of case law applying a technical constructive trust and the great volume of cases applying limitations or laches to avoid doing so.

As before pointed out, notwithstanding an apparent delay of five years and the consequent bar of the statute of limitations in this case, apparent on the face of the report of the Receiver (R., 1), there was not only no statement by the Receiver as to ignorance of the fraud, concealment, trick to deceive, or other impediment in-

applied to this case the principle of law governing it in the status of the parties, viz.: That nothing having been done by Ambrose to prejudice the rights of the corporation to which he stood in a fiduciary relation, *neither* he nor respondents are bound as constructive trustees; and its decision should be affirmed.

On the error of the trial court in entering plural decrees, the decision of the Appellate Court should be affirmed.

On all or any one of the jurisdictional errors of the trial court the decision of the Appellate Court should be affirmed.

Respectfully submitted,

LOUIS A. DENT,
For Respondents.

JACKSON, RECEIVER OF THE FIRST CO-OPERATIVE BUILDING ASSOCIATION OF GEORGETOWN, D. C. *v.* SMITH ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 130. Argued December 17, 1920.—Decided January 24, 1921.

Persons who knowingly join with a receiver in purchasing real estate at a sale made by the trustee of a deed of trust mortgage securing a debt due the receivership, are jointly and severally liable to the receivership for all profits realized from the purchase. P. 588.

48 App. D. C. 565, reversed.

THE case is stated in the opinion.

Mr. W. W. Millan for petitioner.

Mr. Louis Addison Dent for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Smith and Wilson were sued in the Supreme Court of the District of Columbia by the receiver of the First Co-operative Building Association of Georgetown, D. C., for the amount of profits made by them and a former receiver of the Association in the purchase at a foreclosure sale and subsequent resale of land mortgaged to secure a note owned by the Association. The Supreme Court held them liable for the full amount of the profits, $743.68, with interest and costs. The Court of Appeals of the District reversed the decree and ordered that the bill be dismissed with costs. 48 App. D. C. 565. A writ of certiorari was granted by this court. 250 U. S. 655. The question before

us is whether the respondents are liable upon the following facts, and if so in what amount.

In 1908 the Supreme Court of the District appointed William E. Ambrose, a member of its bar, receiver of the First Co-operative Building Association of Georgetown, D. C. Among the assets of the Association so entrusted to the receiver was a note of Schwab for $2,700, secured by a mortgage deed of trust of land. The note being in default, Ambrose as receiver requested the trustee under the deed of trust to advertise the land for sale at public auction. The auction sale was held and a bid of $350 was made by Edwin L. Wilson, a member of the bar; but the trustee withdrew the property from sale because the bid was inadequate. Thereafter it was arranged between Wilson, Ambrose, and another lawyer, John Lewis Smith, who was counsel of the receiver, that the trustee should again advertise the property for sale; that Wilson should at the second sale use his own judgment whether to bid and, if so, what amount; and that, if he should happen to become the purchaser, the three should be jointly liable for the purchase price and any expenses incident to the purchase and should be jointly interested in the property purchased. The second sale was duly advertised. Smith and Ambrose were present, but gave no instructions or directions in regard to the sale either to the trustee or to his auctioneer. Wilson also attended and in the exercise of his own judgment and without previous conference with either Smith or Ambrose bid $491 and became the purchaser of the property. There was no evidence of any improper influence at the sale to prevent competition or to close competitive bidding or to bring about the sale to Wilson in preference to any one else. On the contrary it affirmatively appears that the sale was fairly conducted; that there was competitive bidding; and that the property was finally knocked down to the highest bidder.

Within a few days after the second sale Wilson and

Smith found, through the aid of real estate agents, a purchaser named Kite who was willing to pay $1,400 for the land. In order to convey a good title it was necessary to clear the land of tax liens and an outstanding tax title. This required $550—that is, $59 more than Wilson had bid. He voluntarily raised his bid by that amount. The land was conveyed by the trustee to Wilson and by Wilson to Kite, the deeds being recorded simultaneously when Kite paid the $1,400. Of this amount $652.32 was used to discharge taxes, tax liens and expenses of sale. The balance, $743.68, was divided equally between Wilson, Smith and Ambrose individually. Wilson had paid out in making the purchase no money of his own or theirs. The estate of which Ambrose was receiver got nothing, as the amount required to discharge the tax liens exceeded the amount bid by Wilson. Much later the facts were brought to the attention of the Supreme Court of the District. Ambrose resigned as receiver; Jackson was appointed in his stead; and as receiver brought this suit against Wilson and Smith to recover the profits which had been made by them and Ambrose.

Ambrose had, as receiver, the affirmative duty to endeavor to realize the largest possible amount from the Schwab note. *Baker* v. *Schofield*, 243 U. S. 114; *Robertson* v. *Chapman*, 152 U. S. 673, 681. To this end it was his duty to endeavor to have the land, when sold under the trust deed, bring the largest possible price. *J. H. Lane & Co.* v. *Maple Cotton Mill*, 232 Fed. Rep. 421. When he agreed with Smith and Wilson to join in the purchase if Wilson should become the successful bidder, he placed himself in a position in which his personal interests were, or might be, antagonistic to those of his trust. *Michoud* v. *Girod*, 4 How. 503, 552. It became to his personal interest that the purchase should be made by Wilson for the lowest possible price. The course taken was one which a fiduciary could not legally pursue. *Magruder* v. *Drury*,

235 U. S. 106, 119, 120. Since he did pursue it and profits resulted the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, although the estate may not have been injured thereby. *Magruder* v. *Drury*, 235 U. S. 106. And others who knowingly join a fiduciary in such an enterprise likewise become jointly and severally liable with him for such profits. *Emery* v. *Parrott*, 107 Massachusetts, 95, 103; *Zinc Carbonate Co.* v. *First National Bank*, 103 Wisconsin, 125, 134; *Lomita Land & Water Co.* v. *Robinson*, 154 California, 36. Wilson and Smith are therefore jointly and severally liable for all profits resulting from the purchase; the former although he had no other relation to the estate; the latter, without regard to the fact that he was also counsel for the receiver.

It is said that, at a sale made under a mortgage deed of trust, the duty to obtain the highest possible price rests not upon the note holder, but upon the trustee under the deed of trust, and that the creditor may bid at the sale or refrain from so doing, as he may see fit. *Richards* v. *Holmes*, 18 How. 143, 148; *Smith* v. *Black*, 115 U. S. 308, 315. This is true so far as it concerns the duty of the note holder to the debtor or other owner of the mortgaged property. But the many cases cited to this effect in Smith's and Wilson's behalf do not bear upon the question before us. Smith and Wilson are held liable for knowingly confederating with one who, as receiver of the estate of the note holder, owed a duty to it, and who put himself in a position where his personal interest conflicted with his duty.

We have considered the many other arguments urged in defense, but find in them nothing which should relieve Smith and Wilson from this liability. The decree of the Court of Appeals of the District of Columbia is reversed with costs and that of the Supreme Court of the District is affirmed.

Reversed.